152 US 172

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1251~~. 1250 1701 157

JASON G. MILLER, PLAINTIFF IN ERROR,

vs.

DOMINIC G. COURTNAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED AUGUST 28, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1251.

JASON G. MILLER, PLAINTIFF IN ERROR,

vs.

DOMINIC G. COURTNAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, within the eighth judicial circuit, sitting in the circuit court of the United States for said district of Nebraska, at the term of November, A. D. 1889.

Be it remembered that on the 21st day of February, 1887, a petition was filed in the office of the clerk of said circuit court; which said petition is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JASON G. MILLER, Plaintiff,
vs.
DOMINIC G. COURTNAY, Defendant.

Petition.

The plaintiff complains of the said defendant and for cause of action shows that the plaintiff is a resident and citizen of Pasadena, State of California, and that the defendant, Dominic G. Courtnay, is a resident and citizen of the city of Lincoln, State of Nebraska, and that the matter in controversy in this suit exceeds the sum of $500, exclusive of costs.

The plaintiff further complains and says that he has a legal estate in and is entitled to the possession of the following-described premises, situated in the county of Lancaster and State of Nebraska, to wit:

All that portion of the southwest quarter (S. W. ¼) of the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of section numbered twenty-five (25) of town. numbered ten (10) north of range numbered six (6) east of the sixth P. M., which lies north of the north line of a continuation of "M" street as the same is located through the city of Lincoln, being a strip of land about
2 eighty feet wide by forty rods long, and also the following tract of land, lying adjacent thereto, for a public street, to wit: Commencing at a point 650 feet east of the southeast corner of block No. 19 of Lavender's Addition to the city of Lincoln, for a commencement point, thence east 40 rods; thence south 100 feet; thence west 40 rods; thence north 100 feet to the place of beginning.

And that said defendant, ever since the 18th day of Dec., 1885, has unlawfully kept and still keeps the plaintiff out of the possession thereof.

Second Cause of Action.

The defendant, while unlawfully in possession of said premises, has received the rents and profits thereof from the 18th day of December, 1885, to the commencement of this action, amounting to the sum of — dollars, and hath applied the same to his own use, to

the plaintiff's damage in the sum of $—. Wherefore the plaintiff prays judgment for the delivery of the possession of the said premises to him and also for the sum of $300 for said rents and profits.

LAMB, RICKETTS AND WILSON,
Plaintiff's Att'ys.

STATE OF NEBRASKA, } ss:
Lancaster County, }

Jason G. Miller, plaintiff in the above action, being first duly sworn, on oath says that the facts stated in the above petition are true as he verily believes.

JASON G. MILLER.

Subscribed in my presence and sworn to before me this 7th day of Dec., 1886.

R. S. MOCKETT,
Notary Public.

Upon the back of said petition appear endorsements in words and figures following, to wit: No. 357. L. Jason G. Miller *vs.* Dominic G. Courtnay. Petition. Filed Feb. 21, 1887. Elmer D. Frank, clerk. Lamb, Ricketts & Wilson, plaintiff's att'ys.

3 Thereupon, afterwards, to wit, on the 26th day of March, 1887, answer was filed in said case; which said answer is in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska.

JASON G. MILLER, Plaintiff,
vs.
DOMINIC G. COURTNAY, Defendant. } Answer.

1st. And now comes the said defendant and for answer to the plaintiff's petition denies each and every allegation in the said petition contained.

2nd. And this defendant says that Martha I. Courtnay is a party in interest in and to the said land described in the said plaintiff's petition and holds the title to said premises described in said plaintiff's petition by title superior to that of the plaintiff or defendant, and that said Martha I. Courtnay is the wife of said Dominic G. Courtnay, and defendant demands judgment for costs of suit.

3rd. And the said defendant further says that the said plaintiff ought not to have or maintain his said action because he says said plaintiff's action did not accrue to him within the ten years next before the commencement of this action.

4th. And the said defendant, D. G. Courtney, defendant Martha I. Courtnay, Henry Atkins, and Sidney C. Matson, grantors of Martha I. Courtnay, have been in the public, open, and notorious possession of said premises described in said plaintiff's petition for more than ten years next before the commencement of this action

and holding the same adversely to the pretended claim of this plaintiff, and the said plaintiff is estopped to have or maintain his said action.

5th. And the defendant, further answering, says that he claims title under sheriff deeds issued by the sheriff of Lancaster
4 county, Nebraska, said deeds bearing date on the —— —, and issued and delivered by reason of certain executions and sales issued on certain judgments obtained by Henry Atkins in the district court of Lancaster county, Nebraska, against Luke Lavender, said judgments bearing date —— —, one for $2,083, bearing date November 3rd, 1873, and the other bearing date November 4th, 1874, for the sum of $44,090.

6th. Defendant further says on the —— —, Luke Lavender filed his petition in the district court of Lancaster county, Nebraska, against this defendant and Martha I. Courtney, in which he claimed title to the property set out in this plaintiff's petition, and on the 25th day of December, 1885, the following decree was entered in said court, a copy of which is hereunto attached, marked Exhibit "A," and made a part of this answer.

O. P. MASON AND
D. G. COURTNEY,
Att'ys for Defendant.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

Dominic G. Courtney, duly sworn, on oath says that the facts set forth in the foregoing answer are true as he verily believes.

D. G. COURTNEY.

Subscribed in my presence and sworn to before me this 25th day of March, 1887.

[SEAL.] H. J. COSGROVE,
Notary Public.

EXHIBIT "A."

Pleas in the district court of the second judicial district of Nebraska in and for Lancaster county, at the October, A. D. 1885, term of said court, begun and held at the city of Lincoln, in said county and State, on the 12th day of October, in the year of our Lord one thousand eight hundred and eighty-five, and on a day therein, to wit, on the 5th day of November, A. D. 1885 (that being the 20th judicial day of said October term of said court)—present, Honorable
S. B. Pound, judge, presiding; S. M. Melick, sheriff, and E.
5 F. Sizer, clerk—the following proceedings, among others, were had and done, to wit:

LUKE LAVENDER *vs.* HENRY ATKINS, MARTHA I. COURTNAY, AND D. G. COURTNAY.	3542.	L. 125.

This 5th day of November, A. D. 1885, came on this cause to be decided, and thereupon the court finds the facts upon the issues joined in favor of the plaintiff as to those lands described as the southwest quarter of the northwest quarter of the northeast quarter of section twenty-five, township ten north, of range six east, in Lancaster county, Nebraska, and that the plaintiff is entitled to redeem the same and to be restored to the possession thereof upon the payment within six months next ensuing of the sum of two hundred and thirty-four dollars, with interest thereon, at the rate of seven per centum per annum, from March 22, 1879, until the same is paid into court for said defendants; to which defendants except.

[On the margin:] See modification of decree, Dec. 28th, 1885, J'n'l L., 515.

It is therefore ordered, adjudged, and decreed that upon the payment by the plaintiff of said sum into court for the defendants within the time aforesaid the sheriff's sale of March 22, 1879, and deed to said lands, to wit, the southwest quarter of the northwest quarter of the northeast quarter of section twenty-five, township ten north, of range six east, in Lancaster county, Nebraska, be set aside, annulled, and held for naught, and the title to said lands be quieted in the plaintiff as against all claims or title that said defendants or either of them and all persons holding or claiming to hold under them or either of them may have or claim to have under and by virtue of said sale and deed, and that the defendants and each of them convey to plaintiff all right, title, and interest by them or either of them held or claimed in and to said lands by virtue of said sale and deed, and that plaintiff have possession of said lands and execution therefor.

And that in default of the plaintiff making such payment within the time aforesaid it is ordered, adjudged, and decreed that
6 the title in and to the said lands, to wit, the southwest quarter ($\frac{1}{4}$) of the northwest quarter of the northeast quarter of section twenty-five, town. ten —, range 6 east, in Lancaster county, Nebraska, be quieted in the defendant, Martha I. Courtnay; to which defendants except.

This decree, however, is not to affect any judgment or execution lien or liens which said defendants or either of them may have or hold on said lands; and plaintiff excepts thereto and prays an appeal therefrom, which is allowed.

And the court further finds, as to the rest and residue of said lands in the petition described, the issues joined in favor of the defendants and against the plaintiff; and it is further ordered and decreed that the title in and to all the rest and residue of said lands in the petition described be quieted in the defendants; and the plaintiff excepts thereto and prays an appeal, which is allowed.

And the court further adjudges and decrees that each party, plain-

tiff and defendants, pay one-half of the costs of this action, taxed at $80.50.

Thereupon the parties each severally pray an appeal from so much of this decree as is adverse to them, and the appeals so prayed are allowed and supersedeas bond of plaintiff is fixed in the sum of one thousand dollars and bond on part of defendants is fixed in the sum of five hundred dollars, the same severally to be filed within 20 days, and the parties are each given 40 days from the rising of the court to reduce exceptions and evidence to writing.

S. B. POUND, *Judge.*

And be it further remembered that on the 28th day of December, A. D. 1885 (that being the 45th judicial day of said October term of said court)—Honorable S. B. Pound, judge, presiding—the following proceedings were had and done in said cause, as appears upon page 515 of Court Journal "L," to wit:

7 LUKE LAVENDER *vs.* HENRY ATKINS, MARTHA I. COURTNAY, & D. G. COURTNAY. } 3542. L. 125.

This day came the defendants with the written stipulation filed herein, which is in the words and figures following, to wit: "This cause is settled and the judgment and decree rendered in the district court of Lancaster county is in all things affirmed and all errors are waived by the plaintiff, and the said plaintiff waives that part of the decree in this case which gives said plaintiff the right to redeem certain parts of said premises mentioned in said decree, and the said Luke Lavender and wife deeds all of said premises mentioned in the said decree to D. G. Courtnay, and defendants herein agree to pay all the costs, and judgment is rendered for the same in favor of the plaintiff.

This 18th day of December, 1885.

D. G. COURTNAY,
Att'y for Def'ts.

Witnesses:
J. V. ATKINSON.
E. P. CAMPBELL.
LUKE LAVENDER.

[On margin:] See Decree, Nov. 5, 1885, J'n'l L, 358.

It is therefore considered by the court that so much of the decree rendered in this cause November 5th, 1885, as finds in favor of the plaintiff as to the southwest quarter of the northwest quarter of the northeast quarter of section numbered twenty-five (25), in township ten (10) north, in range six (6) east, in Lancaster county, Nebraska, and the right given plaintiff to redeem the same, and all errors taken by plaintiff is hereby set aside and held for naught, and that the plaintiff have and recover from Henry Atkins, Martha I. Courtnay, and D. G. Courtnay the costs of this suit, taxed at $80.50.

Certificate.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

I, E. F. Sizer, clerk of the district court, second judicial
8 district of Nebraska in and for said county, do hereby certify that the above and foregoing are true and correct copies of the decree rendered by said court on the 5th day of November and the 28th day of December, A. D. 1885, respectively, in a cause in said court wherein Luke Lavender is plaintiff and Henry Atkins *et al.* are defendants, as the same appears fully upon pages 358 and 515 of Court Journal "L," respectively, of the records of said court and now in my charge remaining as clerk aforesaid.

In testimony whereof I have hereunto set my hand officially and attached the seal of said court, at Lincoln, this 25th day of March, A. D. 1887.

[SEAL.] E. R. SIZER, *Clerk D. C.*

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 357. L. Jason G. Miller *vs.* Dominic G. Courtnay. Answer. Filed M'ch 26, 1887. Elmer D. Frank, clerk. O. P. Mason, D. G. Courtnay for def'ts.

Thereupon, afterwards, to wit, at the May term of said court, on the 3rd day of May, 1887, the following proceedings were had and done in said cause, as appears of record on folio 42, Journal "M," of said court, to wit:

J. G. MILLER } 357. L.
vs.
D. G. COURTNAY. }

On motion of plaintiff, leave is granted by the court to reply herein in seven days.

Thereupon, afterwards, to wit, on the 6th day of May, 1887, a reply was filed in said case; which said reply is in words and figures following, to wit:

Reply.

In the Circuit Court of the United States for the District of Nebraska.

JASON G. MILLER, Plaintiff, }
vs.
DOMINICK G. COURTNAY, Defendant. }

9 Comes now the plaintiff and, replying to the defendant's answer herein filed, alleges and says that he denies each and every allegation of new matter in said answer contained and asks judgment as prayed in his petition.

LAMB, RICKETTS & WILSON,
Attorneys for Plaintiff.

STATE OF NEBRASKA, } ss:
Lancaster County, }

Jason G. Miller, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing reply and believes the matters and facts therein contained to be true.

J. G. MILLER.

Subscribed in my presence and sworn to before me this 4th day of May, 1887.

[SEAL.] R. S. MOCKETT,
Notary Public.

Upon the back of said reply appear endorsements in words and figures following, to wit: No. 357. L. Jason G. Miller, pl'ff, *vs.* Dominick G. Courtnay, def't. Reply. Filed May 6, 1887. Elmer D. Frank, clerk. Lamb, Ricketts & Wilson, attorneys for plaintiff.

Thereupon, afterwards, to wit, at the November term of said court, on the 15th day of November, 1887, the following proceedings were had and done in said cause, as appears of record on folio 448, Journal "M," of said court, to wit:

JASON G. MILLER
vs.
D. G. COURTNAY. } Trial. 357. L.

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit:

1, John F. Price; 2, A. G. Robinson; 3, John Manning; 4, Thos. McNeil; 5, A. Bollman; 6, Henry Bacon; 7, T. D. Black; 8, W. P. Morrow; 9, John McArdle; 10, John Wheeler; 11, Robert Mason; 12, I. N. Lyon, who were duly empaneled and sworn according to law; and thereupon, after hearing the evidence, argument, and charge of the court, the jury retire to their room in charge of a bailiff, duly sworn, for deliberation.

And now come said jury into open court and present to the court their verdict, which is in words and figures following, to wit:

"In the Circuit Court.

JASON G. MILLER, Pl'ff,
vs.
DOMINIC G. COURTNAY *et al.*, Def'ts.

We, the jury in this cause, being duly impaneled and sworn, do find the issues joined in said cause in favor of the defendant.

(S'g'd) T. D. BLACK, *Foreman.*"

It is therefore considered, ordered, and adjudged by the court that the defendant is the owner of and entitled to the immediate possession of the premises in dispute herein, and that said defendant,

Dominic G. Courtnay, have and recover the same of and from the said plaintiff, Jason G. Miller, together with $—, costs herein expended; and on motion of plaintiff it is further ordered by the court that the judgment and verdict herein be, and the same is hereby, set aside and a new trial of this cause ordered.

Thereupon, afterwards, to wit, at the said November term of said court, on the 15th day of November, 1887, the following proceedings were had and done in said cause, as appears of record on folio 449, Journal "M," of said court, to wit:

JASON G. MILLER
vs.
DOMINIC G. COURTNAY. } 357. L.

On motion of defendant, by O. P. Mason, his attorney, leave is granted by the court to amend the answer herein in thirty days. Plaintiff is ruled to reply in forty days from date.

Thereupon, afterwards, to wit, at the January term of said court, on the 19th day of January, 1889, the following proceedings were had and done in said cause, as appears of record on folio 278, Journal "N," of said court, to wit:

11 JASON G. MILLER
vs.
DOMINIC G. COURTNAY. } Trial. 357. L.

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit:
1, Martin Warner; 2, S. L. Thomas; 3, Paul Peterson; 4, Lynn Nelson; 5, John Pohlman; 6, J. S. Bennett; 7, John Jack; 8, John Schuler; 9, W. W. Crandall; 10, Wm. Anderson; 11, J. B. Sedgwick; 12, George Leavitt, who were duly empaneled and sworn according to law; and thereupon, after hearing the evidence in part and the time having arrived for the adjournment of the court and the trial of this cause not being finished, the same was continued until ten o'clock Monday morning.

Thereupon, afterwards, to wit, at the Januaay term of said court, on the 21st day of January, 1889, the following proceedings were had and done in said cause, as appears of record on folio 280, Journal "N," of said court, to wit:

JASON G. MILLER
vs.
DOMINIC G. COURTNAY. } Trial Continued. No. 357. L.

On this day again came the parties hereto, by their attorneys; also came the jury empaneled and sworn herein. Said jury heard further testimony, and, the time having arrived for the adjournment of the court and the trial of this cause not being finished, said

jury was allowed to separate until the coming in of court to-morrow morning.

Thereupon, afterwards, to wit, at the said January term of said court, on the 22nd day of January, 1889, the following proceedings were had and done in said cause, as appears of record on folio 281, Journal "N," of said court, to wit:

12 JASON G. MILLER *vs.* DOMINIC G. COURTNAY. } Cause Submitted to Jury. 357. L.

On this day again came the parties hereto, by their attorneys; also came the jury empaneled and sworn herein. Said jury, after having heard the remaining evidence and the argument of counsel and charge of the court, retire to their room in charge of a bailiff, duly sworn, for deliberation.

Thereupon, afterwards, to wit, at the said January term of said court, on the 24th day of January, 1889, the following proceedings were had and done in said cause, as appears of record on folio 287, Journal N, of said court, to wit:

JASON G. MILLER *vs.* DOMINIC G. COURTNAY. } 357. L.

On this day again came the parties hereto, by their attorneys; also came the jury empaneled and sworn here into open court and presented to the court their verdict, which is in words and figures following, to wit:

Special Findings of Jury.

In the Circuit Court of the United States, Circuit and District of Nebraska.

JASON G. MILLER, Plaintiff, *vs.* DOMINIC G. COURTNAY, Defendant. } Verdict. 357. L.

We, the jury in this cause, being duly empaneled and sworn, under the instructions of the court do find the following special verdict:

First. We find that at the commencement of this suit and now that the plaintiff is a citizen and resident of the State of California and the defendant then was and now is a resident and citizen of the State of Nebraska, and that the sum or amount in controversy in this suit exceeds the sum of six thousand dollars in value beyond costs. Yes.

13 Second. We find that on the first day of December, A. D. 1868, the United States granted to one James K. O. Young by patent the south half of the northeast quarter and the northwest

quarter of the northeast quarter of section twenty-five, township ten north, range six east, as shown by copy of patent hereto attached. Yes.

Patent.

United States
to
James K. O. Young.

Filed for record Feb'y 26th, 1872, 10.55 a. m.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the act of Congress approved March 3, 1855, entitled An act in addition to certain acts granting bounty land to certain officers and soldiers who have been engaged in the military service of the United States, there has been deposited in the General Land Office warrant No. 72348 for 120 acres in favor of John Wesley Warnick and Reuben Griffin Warnick, minor children of John Warnick, deceased, private, Captain Warnick's company, Illinois militia, Black Hawk war, with evidence that the same has been duly located upon the south half of the northeast quarter and the northwest quarter of the northeast quarter of section twenty-five, in township ten north, of range six east, in the district of lands formerly subject to sale at Nebraska City, now Lincoln, Nebraska, containing one hundred and twenty acres, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, the said warrant having been assigned by the said John Wesley Warnick and Reuben Griffin Warnick to William Blair and by him to James O. K. Young, the same as James K. O. Young, in whose favor said tract has been located: Now know ye that there is therefore granted by the United States unto the said James K. O. Young, as assignee as aforesaid, and to his heirs the tract of land above described; to have and to
14 hold the said tract of land, with the appurtenances thereof, unto the said James K. O. Young, as assignee as aforesaid, and to his heirs and assigns forever.

In testimony whereof I, Andrew Johnson, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of December, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States the ninety-third.

By the President:

ANDREW JOHNSON,
By FRANK COWAN, *Sec'y.* [SEAL.]

J. N. GRANGER,
Recorder of the General Land Office.

Recorded vol. 180, page 406.

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, Jno. D. Knight, register of deeds of —— ——, hereby certify that the above and foregoing is a true and correct copy of a patent as appears of record in this office in Deed Record J, at page 288.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at the city of Lincoln, this 13th day of January, A. D. 1888.

[SEAL.]

JNO. D. KNIGHT,
Register of Deeds.
J. H. FAWELL, *Deputy.*

Third. That on the 21st day of August, A. D. 1867, the said James O. Young and Alice Young, his wife, by their warranty deed duly conveyed all those lands aforesaid in the second findings described to one Luke Lavender, the common source of title of plaintiff and defendant in this action, which deed is made a part of this verdict and is hereto attached. Yes.

15 Deed Record A, 146.

Warranty Deed.

J. K. O. Young } to Luke Lavender. }

Filed for record Aug. 26th, A. D. 1867, at half past twelve p. m.
S. B. GALEY, *Co. Clerk.*

This indenture, made the 21st day of August, in the year of our Lord one thousand eight hundred and sixty-seven, between James K. O. Young and Alice Young, his wife, of the county of Lancaster and State of Nebraska, of the first part, and Luke Lavender, of Lancaster Co., Nebraska, of the second part, witnesseth:

That the said party of the first part, for and in consideration of fourhundred (400) dollars, lawful money of the United States, to him duly paid before the delivery hereof, hath bargained and sold and by these presents doth bargain and convey to the said party of the second part, his heirs and assigns forever, all that tract or parcel of land lying, situate, and being in the county of Lancaster and State of Nebraska, which is known and described as follows, viz: The west half of the northeast quarter of section No. 25, in township No. 10 north, of range No. 6 east, containing 80 acres, together with all and singular the tenements, hereditaments, and appurtenances, and all the estate, title, and interest of the said party of the first part therein; and the said party of the first part doth hereby covenant and agree with the said party of the second part that at the time of the delivery hereof the said party of the first part is the lawful owner of the premises above granted and seized thereof in fee simple absolute, and that he will warrant and defend the above-granted

premises in the quiet and peaceable possession of the second party, his heirs and assigns forever.

In witness whereof the party of the first part has hereto set their hands and seals this 21st day of August, A. D. 1867.

JAMES O. YOUNG. [SEAL.]
ALICE YOUNG. [SEAL.]

16 Sealed and delivered in presence of—
WILLIAM GUY.

STATE OF NEBRASKA, } ss:
County of Lancaster, }

On this 21st day of August, A. D. 1867, before me, William Guy, justice of the peace in and for said county, personally appeared the above-named James K. O. Young and Alice Young, his wife, and acknowledged that they did sign and seal the same as their voluntary act and deed for the purposes therein contained.

Given under my hand and seal of office the day and year last aforesaid.

WILLIAM GUY,
Justice of the Peace.

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, Jno. D. Knight, register of deeds of said county, hereby certify that the above and foregoing is a true and correct copy of a deed as appears of record in this office in Deed Record A, at page 146.

In testimony whereof I have hereunto set my hand and affixed the seal of said county at the city of Lincoln this 13th day of Jan'y, A. D. 1888.

[SEAL.]

JNO. D. KNIGHT,
Register of Deeds.
J. H. FAWELL, *Deputy.*

Fourth. That on the twenty-first day of February, A. D. 1883, the said Luke Lavender and Julia A. Lavender, his wife, made, executed, and delivered to the plaintiff, Jason G. Miller, their certain deed in writing, duly executed, in the words and figures following, to wit, and which deed was duly recorded, as shown thereon, in the county clerk's office of Lancaster county, on the 22d day of February, 1883. Yes.

This indenture, made this twenty-first day of February, in the year one thousand eight hundred and eighty-three, between
17 Luke Lavender and Julia A. Lavender, his wife, of Lincoln, Nebraska, of the first part, and Jason G. Miller and the public, of the second part, witnesseth:

That the said party of the first part, in consideration of the sum of one dollar and other valuable considerations to them duly paid, the receipt whereof is hereby acknowledged, have remised, released, and quitclaimed, and by these presents do for themselves, their heirs, executors, and administrators remise, release, and forever

quitclaim and convey, unto the said party of the second part and to his heirs and assigns forever all their right, title, interest, estate, claim, and demand, both at law and in equity, of, in, and to all that certain real estate, situated in the county of Lancaster and State of Nebraska, known and described as follows, to wit, for the exclusive use and purpose of public streets or highways, viz: Commencing at a point 50 feet east of the southeast corner of block (22), in Lavender's Addition to the city of Lincoln, thence running east to the west line of the northwest quarter of the northwest quarter of northeast quarter of section (25), township ten (10) N., R. 6 east; thence south 100 feet; thence west to a point 50 east of the northeast corner of block 19, in Lavender's Addition to the city of Lincoln; thence north 100 feet to the place of beginning, to be used as a continuation of N street.

Also commencing at a point on the sonth line of O street 400 feet east of the northeast corner of block (22), in Lavender's Addition to the city of Lincoln, thence running south 1,900 feet; thence east 100 feet; thence north to the south line of said "O" street; thence west 100 feet to the place of beginning, to be used as a continuation of 20th street.

Also commencing at a point 50 feet east of the southeast corner of block 19, in Lavender's Addition to the city of Lincoln, thence running east to the east line of the northwest quarter of the northwest quarter of the northeast quarter of section (25), T. 10 N., R. 6 east; thence south 100 feet; thence west to a point 50 feet east of
18 the northeast corner of block 12, in Lavender's Addition to the city of Lincoln; thence north 100 feet to the place of beginning, to be used as a continuation and extension of "M" street, together with all and singular the hereditaments and appurtenances thereunto belonging; to have and to hold the above-described premises unto the said Jason G. Miller and the public for said purposes, — heirs and assigns, so that neither they, the said Luke or Julia A. Lavender, or any person in their name and behalf, shall or will hereafter claim or demand any right or title to the said premises or any part thereof, but they and every of them shall by these presents be excluded and forever barred so long as the same is used as public streets or highways.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

LUKE LAVENDER. [L. S.]
JULIA A. LAVENDER. [L. S.]

Signed, sealed, and delivered in presence of—
T. H. HATCH.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

On this 22nd day of February, A. D. 1883, before me, T. H. Hatch, a notary public duly appointed and qualified for and residing in said county, personally came Luke Lavender and Julia A. Lavender, husband and wife, to me known to be the identical persons described

in and who executed the foregoing conveyance as grantors, and acknowledged the said instrument to be their voluntary act and deed.

Witness my hand and notarial seal, at Lincoln, in said county, the day and year last above written.

[SEAL.] T. H. HATCH,
Notary Public.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

Entered on numerical index and filed for record in the
19 clerk's office of said county the 22nd day of Feb'y, 1883, at 3 o'clock and 10 minutes p. m., and recorded in Book 15 of Deeds, at page 74.

J. H. McCLAY,
County Clerk.

100 paid. J. & M.

Fifth. That on the twenty-first day of February, A. D. 1883, the said Luke Lavender and Julia A. Lavender, his wife, made, executed, and delivered to the plaintiff, Jason G. Miller, their certain deed in writing, duly executed, in the words and figures following, to wit, and which deed was duly recorded in the county clerk's office of Lancaster county on the 22nd day of February, A. D. 1883:

Yes.

This indenture, made this twenty-first day of February, in the year one thousand eight hundred and eighty-three, between Luke Lavender and Julia A. Lavender, his wife, of the county of Lancaster and State of Nebraska, of the first part, and Jason G. Miller, of the same county and State, of the second part, witnesseth:

That the said party of the first part, in consideration of the sum of thirteen hundred dollars to them duly paid, the receipt whereof is hereby acknowledged, have remised, released, and quitclaimed, and by these presents do for themselves, — heirs, executors, and administrators, remise, release, and forever quitclaim and convey, unto the said party of the second part and to his heirs and assigns forever all their right, title, interest, estate, claim, and demand, both at law and in equity, of, in, and to all that certain real estate, situated in the county of Lancaster and State of Nebraska, known and described as follows, to wit: The northwest quarter of the northwest quarter of the northeast quarter of section twenty-five (25), t'p 10 ten north, range six (6) east, of the 6th P. M.; also all that portion of the southwest quarter of the northwest quarter of the northeast quarter of said above-described section which lies north of the north line of a continuation of "M" street, as the same is located, through the city of Lincoln; also commencing at the northwest corner of the northwest quarter of the northwest quarter of the northeast quarter
20 of section 25, t'p 10 N., R. 6 aforesaid, running thence west to the east line of a continuation of Twentieth street, in the city of Lincoln; thence south three hundred feet; thence east,

on the north line of a continuation of "N" street in said city of Lincoln, to the west line of said northwest quarter of the northwest quarter of the northeast quarter of said section 25, t'p 10 N., R. 6 east; thence north on said west line to the place of beginning; also the undivided one-half of —, commencing at the southeast corner of the northeast quarter of the northwest quarter of the northeast quarter of said section 25, t'p 10 N., R. 6, thence running east $33\frac{94}{100}$ rods; thence south $4\frac{75}{100}$ rods, thence east $6\frac{6}{100}$ rods; thence south $15\frac{22}{100}$ rods; thence west 40 rods; thence north 20 rods to the place of beginning—

Together with all and singular the hereditaments and appurtenances thereunto belonging; to have and to hold the above-described premises unto the said Jason G. Miller, his heirs and assigns, so that neither the said Luke or Julia A. Lavender, or any person in their name and behalf, shall or will hereafter claim or demand any right or title to the said premises or any part thereof, but they and every of them shall by these presents be excluded and forever barred.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

LUKE LAVENDER. [L. s.]
JULIA A. LAVENDER. [L. s.]

Interlineation "of the northeast quarter," between 17th & 18th lines, made before signing.

Signed, sealed, and delivered in presence of—
T. H. HATCH.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

On this 22nd day of February, A. D. 1883, before me, T. H. Hatch, a notary public duly appointed and qualified for and residing in said county, personally came Luke Lavender and Julia A. Lavender, husband and wife, to me known to be the identical persons described in and who executed the foregoing conveyance as grantors, and acknowledged the said instrument to be their voluntary act and deed.

21

Witness my hand and notarial seal, at Lincoln, in said county, the day and year last above written.

[SEAL.]

T. H. HATCH,
Notary Public.

STATE OF NEBRASKA, } ss:
Lancaster County, }

Entered on numerical index and filed for record in the clerk's office of said county the 22nd day of Feb'y, 1883, at 3 o'clock and 10 minutes p. m., and recorded in Book 15 of Deeds, at page 72.

J. H. McCLAY,
County Clerk.

1.00 paid. J. & M.

EXHIBIT C.

That the following is a true and correct copy, transcript, and exemplification of the pleadings and records and of the exhibits, stipulation, and decree out of the district court of Lancaster county, Nebraska, in an action brought and prosecuted therein, wherein the said Luke Lavender was plaintiff and the said Dominic G. Courtnay, Henry Atkins, and Martha I. Courtnay were defendants, to wit. Yes.

Petition.

In the District Court of said County.

STATE OF NEBRASKA, *Lancaster County,* } *ss:*

LUKE LAVENDER
vs.
HENRY ATKINS, MARTHA I. COURTNAY, and D. G. COURTNAY—First Name Unknown.

Luke Lavender, the above-named plaintiff, complains of Henry Atkins, Martha I. Courtnay, and D. G. Courtnay, whose first
22 name is unknown to plaintiff, and for cause of action says that on or about the 3rd day of November, A. D. 1873, he was the owner in fee simple of all the following-described real estate, to wit: The southwest quarter of the northwest quarter of the northeast quarter of section 25, township 10 north, of range 6 east, of the 6th P. M.

The southeast quarter of the northwest quarter of the northeast quarter of same section, town., and range; the northeast quarter of the northwest quarter of the northeast quarter of same section, town., and range.

The northwest quarter of the southwest quarter of the northeast quarter of the same section, town., and range.

Also commencing at a point on the half quarter section line in northeast quarter of section 25, township 10 north, range 6 east, which runs north and south through the center of said quarter section, sixty rods south of the north line of said quarter section, thence south forty rods, east forty rods, north forty rods, west forty rods to the place of beginning; also commencing at a point forty-one feet south of the northeast corner of the northwest quarter of said section 25, thence west 170 feet, south 300 feet, west 350 feet, south 500 feet; thence east 350 feet, south 700 feet, east 170 feet, north 1,500 feet to the place of beginning.

Also commencing at the south corner of the northeast quarter of the northwest quarter of the northeast quarter of said section 25, thence east 33.94 rods, south 4.78 rods, east 6.06 rods, south 15.22 rods, west 40 rods, north 40 rods to the place of beginning.

Also commencing fifty feet east of the northeast corner of block 12, Lavender's 2nd Addition to the city of Lincoln, thence south

300 feet, east fifty feet, south 400 feet, east 150 feet, north 150 feet, west 100 feet, north 250 feet, east 250 feet, north 300 feet, west 350 feet to place of beginning.

Also commencing 50 feet east of the northeast corner of block 22, Lavender's Addition to Lincoln, thence south 300 feet, east 50 feet, north 300 feet, west 50 feet to the place of beginning.

23 Also lots 2 and 3, in block 2, Lavender's Addition to the the city of Lincoln; also all of block 3, Lavender's Addition to Lincoln; also lots 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, and 12, in block nine (9), Lavender's Addition to Lincoln, and other lands and lots, all lying and being in the county of Lancaster and State of Nebraska; which said real estate plaintiff avers was reasonably worth the sum of one hundred thousand dollars, and that the same were wholly unincumbered except for the sum of two thousand dollars due to Henry Atkins, one of the above-named defendants, which sum was secured by mortgage on fifteen acres of the above-described land, and for the further sum of three thousand dollars due to the said Henry Atkins and secured by mortgage on eleven lots in block nine, Lavender's Addition to Lincoln; and plaintiff avers that on or about the 23rd day of April, A. D. 1873, one Palmer Way secured a judgment in this court against him, and between said 23rd day of April and the 4th day of November, A. D. 1873, two other judgments were recovered in said court against said plaintiff, all of said judgments amounting in the aggregate to about eight hundred and fifty dollars, and that on said 4th day of November, A. D. 1873, the said defendant, Henry Atkins, recovered in this court a judgment against plaintiff for $2,083.33, being for amount due on his said claim of two thousand dollars so secured by mortgage as aforesaid on fifteen acres of plaintiff's said real estate; all of which said judgments became and were valid and subsisting liens upon all of plaintiff's said real estate, except such portion thereof as might be exempt from levy and sale under the homestead laws of Nebraska.

And plaintiff further avers that between the said 4th day of November, A. D. 1873, and the 12th day of November, A. D. 1874, there were several other judgments rendered in this court against said plaintiff in favor of divers other persons and which amounted in the aggregate to $2,946.31 and which became liens on plaintiff's said real estate subject to his homestead interest therein, and that on said last-mentioned day the said Henry Atkins procured in this

24 court his second judgment against this plaintiff for the sum of $3,739.85, which said judgment was rendered upon his said claim for three thousand dollars, which was secured on eleven lots in block nine, Lavender's Addition to Lincoln as aforesaid, and which said judgments provided for the foreclosure and sale of said mortgaged premises and provided for execution to issue for any balance remaining due after applying on said judgment the proceeds of sale of said mortgaged premises.

And plaintiff avers that on said 12th day of November, A. D. 1874, the said mortgaged premises were reasonably worth the sum of twenty-five hundred dollars, and that all of the said judgments above mentioned, and which amounted in the aggregate to about $9,620.00,

were valid and subsisting liens upon all of plaintiff's said real estate except his homestead interest therein; and plaintiff avers that at the time said last-mentioned judgment was so rendered his said real estate was reasonably worth the sum of seventy-five thousand dollars over and above his said homestead exemption. Plaintiff avers that from that time hitherto, if the said judgment creditors had at any time caused execution to be duly issued and levied upon the said real estate of this plaintiff, and had caused the same to be honestly appraised according to law, and had conducted the sale of said property in a fair, honest, and lawful manner, so that a title could have been acquired thereto under and by virtue of such sale, all of said judgments could have been fully satisfied and there would have been left to this plaintiff from forty to fifty thousand dollars' worth of his said real estate; yet plaintiff avers that the said defendant, Henry Atkins, with a view to dishonestly, unfairly, and unlawfully deprive this plaintiff of a large amount of his said property, proceeded to buy up several of the outstanding judgments above mentioned; and plaintiff avers that one John S. Gregory, with a view to fraudulently, wrongfully, and dishonestly secure to himself a large amount of plaintiff's said property, bought
25 up a large number of the intervening judgments so rendered against this plaintiff between the dates of said Atkins' first and second judgments, as hereinabove described, and had the same assigned to his wife, E. Mary Gregory, and his daughter, Julia M. Gregory; but plaintiff avers that whatever consideration was paid for said judgments was paid by said John S. Gregory; and, after having so secured the control of a greater portion of said judgments, plaintiff avers that the said defendant Henry Atkins and the said John S. Gregory and the defendant D. G. Courtnay, who is a son-in-law of said Henry Atkins, and who had been and was then acting as the attorney of said Atkins, and one James E. Philpott, who was acting as the attorney of this plaintiff, wrongfully and fraudulently combined and confederating together for the purpose of cheating and defrauding this plaintiff, and wrongfully and unlawfully securing to themselves the whole of his said property for the nominal price of their said judgments, publicly asserted that there was such a conflict of interests among the judgment creditors of said plaintiff that it would be impossible for any person to secure a good title to any of said property under sales to be had under said judgments; and plaintiff further avers that in pursuance of said confederation and unlawful purpose, and with a view of rendering this plaintiff unable to raise money on his said property for the purpose of paying off and cancelling said judgments, and with the object of rendering him wholly helpless in the premises, the said James E. Philpott, still pretending that he was acting in good faith as the attorney and legal advisor of this plaintiff, did by false and fraudulent representations and advice prevail upon the plaintiff to suffer him, the said James E. Philpott, to prepare and file in the United States district court for the district of Nebraska this plaintiff's voluntary petition in bankruptcy, which said petition was filed on or about

the 25th day of March, A. D. 1875; yet defendant
26 avers that, in still further pursuance of said unlawful confederation and purpose aforesaid, the said Henry Atkins and said John S. Gregory refused to prove up their said claim in said bankruptcy proceedings, and relied *and relied* upon their said judgments as being first liens upon all of this plaintiff's said property, and relied upon the processes of this court to enforce their said liens. Plaintiff further avers that after all of his said lands had been sacrificed upon said judgments, as hereinafter set forth, the said James E. Philpott suffered the said bankruptcy proceedings to be dismissed for want of anything being done therein. Plaintiff further avers that between the said 12th day of November, A. D. 1874, and the 22nd day of September, A. D. 1877, the said Henry Atkins and the said John S. Gregory caused to be issued out of this court, on the several judgments against this plaintiff so owned and controlled by them as aforesaid, upwards of twenty-two different executions, all of which were at divers times levied upon the real estate of this plaintiff; and plaintiff avers that of all the levies so made there were but two or three sales which were afterwards confirmed by this court, and of but a very small amount of property, and that there were several other sales made under said executions to divers disinterested and *bona fide* purchasers at fair prices and for aggregate amounts sufficient to satisfy the several judgments under which said sales were made, and that in all such cases the sales so last mentioned were set aside by this court upon the motion and showing of the said defendant, Henry Atkins, and the said John S. Gregory, and that in the other executions and levies first above mentioned, after levying and advertising said property for sale, the said executions were returned without sale being made by order of said Gregory or Atkins respectively; all of which said facts duly appear of record in this court; and this plaintiff charges that all of said levies, sales, adjournments, and motions to set aside sales so made *was* done by the said Gregory and Atkins for the pur-
pose of destroying the confidence of the public and with the
27 object of securing future low appraisements of plaintiff's said property and preventing competition at future sales of said property to be had under their respective judgments and thereby wronging and defrauding this plaintiff.

And plaintiff further avers that in the fall of 1877 it become necessary for him to leave the State of Nebraska for the purpose of transacting certain business in the State of Ohio; whereupon he left his entire property and business in charge of the said James E. Philpott, relying on him as his attorney to look after and fully protect the interests of this plaintiff and prevent the sacrifice of his said property by profligate, irregular, and unlawful sales under the aforementioned judgments; and plaintiff avers that soon after his departure from the State, as aforesaid, the said above-named defendants and said John S. Gregory and James E. Philpott, in pursuance of their said combination and purpose of wronging and defrauding this plaintiff, caused divers and numerous other executions to be issued upon the said several judgments as owned and controlled by

the said Henry Atkins and John S. Gregory and levied the same upon the said real estate of plaintiff. Plaintiff avers that after so levying said executions said Atkins and Gregory proceeded to advertise and offer for sale plaintiff's said property without having appraised the same according to law. Plaintiff further avers that one of said executions was issued under and by virtue of said judgment first obtained by said Henry Atkins against this plaintiff and was levied on or about the 2nd day of January, A. D. 1879, on a large portion of plaintiff's said real estate, and the same was advertised and offered for sale on the 12th day of February, A. D. 1879, at which time the property so levied on was struck off and sold to divers persons for sums aggregating an amount greatly in excess of the total amount of debt, interest, and costs due on said judgment, and that upon the adjournment of said sale it was discovered that the said Henry Atkins had employed puffers for the purpose of bidding on the property so offered, in the event
28 of there being other bidders for the same, for the purpose of running up the prices of said property so as to prevent any portion of it being sold to *bona fide* bidders, and had resorted to other dishonest and unlawful practices in connection with said levy, appraisement, and sale as to render the same illegal and void, by reason of — said *bona fide* bidders refused to comply with their said bids; whereupon all of said property (except one $4\frac{81}{100}$ acres tract bid in by the said Henry Atkins in the name of Irene Atkins) was returned unsold, and an *alias vendi*, was issued on or about the 19th day of February, A. D. 1879, under and by virtue of which, and without making any further, other, or additional appraisements of any of said property, the said Henry Atkins proceeded to advertise and offer for sale all of said property on the 22nd day of March, A. D. 1879; and plaintiff avers that said Henry Atkins entered into a contract with one Jason G. Miller whereby, and for a certain consideration paid by said Atkins the said Miller, who had intended bidding on said property at the sale so advertised to take place as last aforesaid, agreed to and did refrain from attending said sale or bidding on any of said property, whereby and by reason of the irregular, dishonest, and unlawful manner in which the said Atkins and Gregory and Courtnay and Philpott had conducted the said levies, appraisements, and sales of plaintiff's property upon their said judgments prior to that time the confidence of the public was entirely destroyed, and no disinterested persons would or did bid at said sale of March 22nd, 1879; whereupon ten acres of the land so levied on and then offered for sale was bought by said James E. Philpott, attorney of this plaintiff as aforesaid, in the name of one Allen Field, and all the remainder of said property was then and there bought and bid in by the said defendants, D. G. Courtnay or Henry Atkins, in the name of Martha I. Courtnay, wife of the said D. G. Courtney and daughter of the said Henry Atkins, for merely nominal sums and less than one-fourth of the actual value of said property at that time. Plaintiff further avers that at said
29 sale and other sales made in a similar unlawful manner by the said defendant Henry Atkins and the said Gregory dur-

ing the plaintiff's absence from the State of Nebraska they, the said Gregory, Atkins, Courtnay, and Philpott, secured to themselves or to their wives or daughters sheriff's deeds to the whole of plaintiff's property, except a very small portion of the same, which was purchased at said earlier sales by other parties, and the said defendant Atkins still claims an unpaid and unsatisfied balance equal to about fifty per cent. of the original amount of his said judgment.

And plaintiff avers that, owing to the failure and neglect of his said attorney, James E. Philpott, to account to him for the rents, issues, and profits of his said property he was wholly without the means of returning to the State of Nebraska until some time in November, A. D. 1881, but he avers that as soon as it was possible after his business was completed in Ohio he did return to Nebraska; that immediately after his said return he called upon the said Philpott and demanded a full accounting of their said affairs, when and at which time plaintiff found that the said Philpott was in possession of and claiming as his own ten acres of plaintiff's said real estate, and that the remainder of his said property had been disposed of as hereinbefore stated and was held and possessed by the said Atkins, Courtnay, and Gregory and their respective wives and daughters; whereupon plaintiff at once employed an attorney to examine the records of this court for the purpose of ascertaining what proceedings had been had and taken by the said Atkins, Gregory, and others and to bring as speedily as possible such suit or suits as might be necessary to restore this plaintiff to his rights in the premises; and plaintiff charges that by reason of said fraudulent agreement for the suppression of bids and the fraudulent and unlawful practices of the said Atkins, Courtney, Gregory, and Philpott so conspiring as aforesaid the said sale of March the 22nd, 1879, and all prior sales of plaintiff's said property made under and by virtue of said judgments under which said defendants, Henry Atkins, Martha I. Courtney, and D. G. Courtney, claim or have claimed title to any portion of plaintiff's said property are and ever have been fraudulent and illegal, and that the confirmation thereof *were* procured by misrepresentations, fraud, concealment, and imposition, and ought each and every one of them to be annulled, set aside, and held for naught, and this plaintiff ought to be allowed to extinguish all said liens upon his said property upon full payment of such sums as a court of equity may find, upon a full hearing of all the facts, to be justly and equitably due upon said judgments. Wherefore the plaintiff prays that the said Henry Atkins, Martha I. Courtnay, and D. G. Courtnay, (whose first name is unknown to plaintiff) may be made parties hereto, and that summons may issue for that purpose, and that they be required to set up fully in their answer hereto all interest which they or either of them have or claim in any or all of the said judgments so recovered against this plaintiff, as hereinbefore mentioned, and to state fully and particularly the nature and extent of any and all other demands, claims, or liens which they or either of them may have on or against the premises described in plaintiff's said petition, or any of plaintiff's said real estate, and that upon a full hearing of

all the facts and allegations herein contained the court will find and decree that the said sale of March 22nd, 1879, and all other sales made by virtue of any of the judgments so owned and controlled by the said Atkins, Courtnay, or Gregory, under which the said defendants now claim title to any portion of plaintiff's said property, may, so far as they apply to the property so claimed, be set aside and held for naught; and plaintiff further prays that an account may be had and taken of the amount of principal and interest equitably due upon the judgment against this plaintiff so held and owned by the said defendants or either of them, com-
31 puting the interest and costs upon such judgments from their respective dates to such time or times as it may appear from the evidence that the same might, by a fair and honest use of the process of this court, have been fully satisfied by sale of plaintiff's property or otherwise, and that this plaintiff be allowed to pay into court the amount so found to be due thereon *wherein* a short day to be named by the court and have each of said judgments fully satisfied and cancelled of record; or, upon his failure so to do, that all of the said property may be again fairly and legally appraised and sold according to law, and the proceeds of such sale brought into court for distribution according as the equities of the parties hereto may appear, and for such further, other, and different relief in the premises as equity demands and to your honor seems meet and just.

LUKE LAVENDER.

STATE OF NEBRASKA, }
Lancaster County, } ss:

C. J. ELLIOTT, being first duly sworn, on oath says that he is one of the attorneys for the above-named plaintiff, and as such attorney he prepared and filed the original petition in this cause, which was duly verified and according to law, and that the above and foregoing is a true and substantial copy of said original petition, which has been lost or stolen from the files.

C. J. ELLIOTT.

Signed in my presence and sworn to before me this 7th day of April, 1884.

[SEAL.] WILSON HEWITT,
Clerk of the District Court of Custer Co., Nebr.,
By GEO. M. TREFREN, *Deputy.*

STATE OF NEBRASKA, }
Lancaster County, } ss:

GEORGE H. STEVENSON, being first duly sworn, on his oath says that he is one of the attorneys of record of the above-named
32 plaintiff; that the plaintiff is now absent from Lancaster county, Nebraska; that he has read the foregoing petition; that the same is a substantial copy of the original, for which this is

a supplied copy; that the facts and allegations therein are true as affiant believes.

GEORGE H. STEVENSON.

Subscribed in my presence and sworn to before me this 10th day of April, 1884.

NOVIA Z. SNELL. [SEAL.]
Notary Public.

Endorsed: Luke Lavender *vs.* Henry Atkins *et al.* Petition to supply lost petition. Clerk's office district c't. Filed Apr. 17, 1884. E. R. Sizer, clerk D. C.

Amended Answer.

In the District Court of Lancaster County.

LUKE LAVENDER
vs.
HENRY ATKINS, MARTHA I. COURTNEY, D. G. COURTNEY.

Come now defendants and, for answer to plaintiff's petition herein filed, deni*es* that the plaintiff is entitled to the possession and title, either in law or equity, to the following-described real estate, hereto attached, marked Exhibit "A," and made a part of this answer.

Defendant Henry Atkins admits that he recovered a judgment and decree of foreclosare in the district court of Lancaster county in his favor and against Luke Lavender and Mary Lavender, on or about the third day of November, 1873, for the sum of $2,083.00, by reason of a certain note and mortgage given by the said Luke Lavender and Mary Lavender to Henry Atkins; that said note and mortgage *was* drawing interest at the rate of 12% per annum.

Defendant Henry Atkins further admits that on or about November 12th, 1874, he obtained a further judgment and decree in said court of three thousand seven hundred and twenty-
33 nine dollars and eighty-five cents ($3,739.85) against the said Luke and Mary Lavender by reason of a certain note and mortgage which was drawing interest at the rate of 12% per annum.

Defendants D. G. Courtnay and Martha I. Courtnay allege that they are the owners of the following-described judgments against the said Luke Lavender. A copy hereto attached and marked Exhibit "B" and made a part of this answer.

Defendants allege that the following, Exhibit "C," and made a part of this answer, is a list of the executions and the returns thereon, with the proceedings thereunder, on the judgment for two thousand and eighty-three dollars and the judgment for $3,739.85; and defendants say that none of the lands or lots sold on any of the above executions were sold for less than two-thirds (⅔) the appraised value.

Defendants state that the personal service of summons was had on the said Luke and Mary Lavender in each and all of the above judgments.

Defendants allege that all of the lots or lands which they obtained by reason of their numerous and large judgments *is* as follows—described in Exhibit "D" and made a part of this answer.

Defendants deny each and every allegation in plaintiff's petition contained not herein specifically admitted or denied.

Defendants allege that the amount due on the several judgments owned by them at the contracted rate of interest is as follows, and set out in Exhibit "E" and made a part of this answer.

Defendants allege that no tender of the amount for which the property in question was sold on the said judgments or any portion of the same has ever been made to either of the defendants by the plaintiff.

Defendants allege that in everything which they have done in and about the levying of execution upon their said judgments they have acted in good faith, and that at no time have they entered into any conspiracy or arrangements to cheat or defraud the said
34 plaintiff with any person or persons whatsoever, but have at all times labored diligently to collect their own dues and the judgments which were liens upon said property, as they were justly entitled to do. Defendants further say that the said plaintiff ought not to have or maintain his said action, because that on the 25th day of March, A. D. 1873, said plaintiff filed in the office of the clerk of the district court of the United States in and for the district of Nebraska, within which district the said plaintiff then was domiciled and resident, his petition in bankruptcy, and such proceedings were thereafter therein had and done in said court in said cause that afterwards and on the 26th day of March, A. D. 1875, said plaintiff was duly adjudged a bankrupt under the laws and practice of said court and the acts of Congress relating to the proceedings in bankruptcy, and an assignee in bankruptcy was by said court duly appointed and qualified, and said proceedings in said court have been in nowise reversed, appealed from, or annulled, but still remain in full force and effect. Defendants say that said plaintiff, Luke Lavender, has not yet received his discharge in bankruptcy. Wherefore these defendants say and aver that said plaintiff has no cause of action or right in his own behalf to sue either in law or in equity, for that the judgments upon which the property set out in plaintiff's petition were obtained long prior to the bankruptcy proceedings aforesaid and were liens upon said property so sold. Defendants further admit that on the 3rd day of November, 1873, the said Luke Lavender was the owner of the property set out in plaintiff's petition. The defendants, further answering, say that the plaintiff ought not to be permitted to maintain his said action as regards the following 10-acre tract described: The southeast quarter, ¼, of the northwest quarter, ¼, of the northeast quarter of section 25, town. 10 north, of range 6 east, of 6th P. M., in Lancaster county, Nebraska, for that long prior to the commencement of this suit, to wit, on the 3rd day of July, 1878, said Luke Lavender had conveyed to
35 E. Mary Gregory said tract of land—a copy of said deed is hereto attached, marked Exhibit "E," and made a part of this answer—and at the time of the commencement of this suit said

Lavender had no interest in said tract, either in law or in equity; and defendants say that afterwards, to wit, on the 23rd day of August, 1880, said E. Mary Gregory conveyed by deed to Martha I. Courtnay said tract of land. A copy of the said deed is hereto attached, marked Exhibit "F," and made a part of this answer.

And defendant further alleges that the different pieces of property set out in plaintiff's petition were sold by defendant on a second judgment against the plaintiff long prior to any contract of any kind with the said Miller concerning any of the property in question; that said Lavender had no interest in and to the land in controversy at the time of the sale in the first judgment, and that his interests were in nowise affected; that said property was sold—was long prior thereto sold under and — virtue of an execution issued on the second judgment in favor of Atkins and against said Lavender for the sum of $3,739.85, and that Lavender's interest, entire, in and to any of said property was so sold for not less than two-thirds its appraised value, as required by law; and defendants say plaintiff ought not to maintain his said action, for that more than two years *has* elapsed since the final order of confirmation was had up to the commencement of this suit.

Defendants deny each and every allegation in plaintiff's petition filed not herein specifically admitted or denied. Defendants therefore pray that a decree be rendered in their favor quieting their title in and to the different parcels of land set forth in plaintiff's petition, and that a judgment for costs and such — and further relief as is right and just in equity.

D. G. COURTNAY,
Att'y for Def'ts.

STATE OF NEBRASKA, } ss:
Lancaster County, }

D. G. COURTNEY, — duly sworn, says the facts set forth in
36 the foregoing answer are true as he verily believes.

D. G. COURTNEY.

Subscribed in my presence and sworn to before me this 29th — ——, 1884.

S. T. COCHRAN,
Justice of the Peace.

EXHIBIT A.

The southwest quarter of the northwest quarter of the northeast quarter of section 25, township 10 north, range 6 east, of the 6th P. M.; the southeast quarter of the northwest quarter of the northeast quarter of section 25, township 10 north, range 6 east, of the 6th P. M.; the northwest quarter of the southwest quarter of the northeast quarter of section 25, township 10 north, range 6 east, of the 6th P. M.; the northwest quarter of the northwest quarter of the northeast quarter of section 25, township 10 north, range 6 east, of the 6th P. M.; also commencing on the half quarter section line in the northeast quarter of section 25, township 10 north, range 6 east,

of the 6th P. M., which runs north and south through the center of said quarter section at a point sixty rods south of the north line of said quarter section, thence running south 40 rods, thence east 40 rods, thence north 40 rods, thence west 40 rods to the place of beginning; also commencing at a point 41 feet south of the northeast corner of the northwest quarter of section 25, township 10 north, range 6 east, of the 6th P. M.; thence running west 170 feet, thence south 300 feet, thence west 350 feet, thence south 500 feet, thence east 350 feet, thence south 700 feet, thence east 170 feet, thence north 1,500 feet to the place of beginning; also commencing 500 feet east of the southeast corner of block 94, in the city of Lincoln, thence running north 150 feet, thence east 50 feet, thence south 150 feet, thence west 50 feet to the place of beginning; also commencing 50 feet east of the northeast corner of block 72, Lavender's Addition to the city of Lincoln, thence south 300 feet, east 50 feet, south 400 feet, east 150 feet, north 150 feet, west 100 feet, north 250 feet, east 250 feet, north 300 feet, west 350 feet to place
37 of beginning; also commencing 50 feet east of the northeast corner of block 22, Lavender's Addition to the city of Lincoln, thence running south 300 feet, east 50 feet, north 300 feet, west 50 feet to the place of beginning; also lots No. 2 and 3, in block No. 2, Lavender's Addition to Lincoln; also all of block 3, in Lavender's Addition to Lincoln; also lots 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, and 12, in block 9, in Lavender's Addition to Lincoln, more particularly described as follows, viz: Commencing 500 feet east of the northeast corner of block 94, in the city of Lincoln, and on a south line of a continuation of "L." St., thence running south on the east line of 18th St. 300 feet to a point on the north side of a continuation of "K" street, thence east on said continuation line of "K" street 100 feet, thence north 142 ft., thence east 50 —, south 142 feet, east 150 feet to a point where 19th street crosses K street, thence north along the west line of 19th St. 300 feet to J street, thence west along the south side of L street 300 feet to the place of beginning, together with other lots and lands all lying in and adjacent to the city of Lincoln, in the county of Lancaster and the State of Nebraska.

EXHIBIT "B."

Henry Atkins *vs.* Luke Lavender: Judgment, $2,083.33; obtained Nov. 4th, 1873. Samuel Roach *vs.* Luke Lavender: Judgment, $180.38; obtained Dec. 2, 1873. A. Parmenter *vs.* Luke Lavender: Judgment, $60.62; obtained Aug. 6th, 1873. Sloss and Smith *vs.* Luke Lavender: Judgment, $236.32; obtained April 17th, 1874. Farmer Bros. *vs.* Luke Lavender: Judgment, $124.38; obtained July 7th, 1874. Seth Robinson *vs.* Luke Lavender: Judgment, $203.33; obtained July 7th, 1874. H. Hallo *vs.* Luke Lavender: Judgment, $218.70; obtained July 23, 1874. Hilda Sales *vs.* Luke Lavender; Judgment, $300.00; obtained Aug. 17th, 1874. Henry Atkins *vs.* Luke Lavender: Judgment, $3,739.85; obtained Nov. 12, 1874; all of the above judgments drawing interest at the rate of 12 per cent. per annum from their date, togteher with the costs in each case.

38 EXHIBIT "C."

HENRY ATKINS
vs.
LUKE LAVENDER. } 790. Ex. Doc. "B," 72.

November 30th, 1874.—Execution issued to Lancaster county January 29th, 1875; execution returned by Sam. McClay, sheriff Lancaster county, Nebr., endorsed with a levy for want of goods and chattels of defendant on the following-described real estate, to wit: Commencing at a point on the northwest corner of the east half of the northeast quarter of section twenty-five (25), in township ten (10) north, of range six (6) east, of 6th principal meridian, in said county, running south on said division line 40 rods to corner; thence south 60 rods, thence east 40 rods, thence north 60 rods, thence west 40 rods to starting point, being 15 acres, more or less; also the northwest quarter of the southwest quarter of the northeast quarter of section twenty-five (25), township ten (10) north, range six (6) east, of the 6th principal meridian, in said Lancaster county, and said property remains unsold for want of time to appraise and advertise the same according to law.

February 10th, 1875.—*Vendi.* issued to Lancaster.

March 6th, 1875.—Copy of appraisal filed by Sam. McClay, sheriff of Lancaster county, of the same property described in above return, to wit, for the 15-acre tract, $1,200.00, and for the N. W. ¼ of S. W. ¼ of N. E. ¼ of 25, 10, 6, appraised at $500, a total appraisement — $1,700.00; dated March 3rd, 1875; Sam. McClay, sheriff, and W. W. English and C. S. Bridges, appraisers; no liens deducted.

April 12th, 1875.—*Vendi.* returned by said sheriff, endorsed No sale of property for want of bidders.

August 15th, 1877.—*Alias vendi.* issued to Lancaster.

October 1st, 1877.—*Alias vendi.* returned by said sheriff, endorsed with an advertisement of the above-described property, according to law, in the Daily State Journal (Nebraska), to sell the same Sep. 17, 1877, at front entrance of Academy of Music (where the last term of D. C. was held), and property remained unsold for
39 want of bidders at said time and place.

March 18th, 1878.—*Alias* execution issued to Lancaster.

March 30th, 1878.—Copy of appraisal filed by Sheriff Hoagland of the following-described real estate, to wit: N. E. ¼ of N. W. ¼ of N. E. ¼ of sec. 25, 10, 6, in said county, valued at $400.00; also commencing at the S. E. corner of the N. E. quarter of the N. W. quarter of the N. E. ¼ of said section 25, T. 10, R. 6, and running thence east 33.94 rods, south 4.78 rods, east 6.06 rods, south 15.22 rods, west 40 rods, south 20 rods to the place of beginning, containing 4.81 acres, valued at 96.20 dollars, and all the lots in the south half of bl'k 12, in Lavender's Addition to Lincoln, valued as follows, to wit, lots 7 and 8, $100.00; lot 9, $30.00; lot 10, $30.00; lot 11, $30.00, and lot 12, $40.00, all of which are in Lancaster Co.,

Neb., and valued at $1,726.20 by said sheriff and John D. Klentch and Geo. R. Tucker, appraisers.

May 18th, 1878.—*Alias* execution returned by Sheriff Hoagland endorsed as follows: That on the 27th day of March, 1878, he duly advertised the property described in the last preceding appraisal in the Spirit of the Age, a newspaper printed and in general circulation in said county, that he would offer said property for sale at the front entrance of the Academy of Music, in Lincoln (being the building *the building* where last term of court was held), on April 30th, 1878, and on said date one J. G. Miller commenced an action by injunction in our said court restraining the sale of the lots in the south half of block 12, Lavender's Addition aforesaid, and by order of plaintiff's attorney for want of time — proceed further by law. (Date of levy of this execution, March 26, 1878; note, motion to vacate former levy and for new execution sustained Nov. 1st, 1877.—Journal E, 179.)

January 2nd, 1879.—*Vendi.* issued to Lancaster.

January 20, 1879.—Copy of appraisal filed by Sheriff Hoagland for the following-described property, to wit: Commencing at a point in the half quarter section line in the northeast quarter of section 25, town. 10, range 6 east, which runs north and south through the centre of said quarter section 60 rods south of the north line of said quarter section, and running thence south on said quarter line 40 rods, east 40 rods, north 40 rods, west 40 rods to the place of beginning, containing ten acres, valued at $300.00; also the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 25, containing ten acres and valued at $350,00; also commencing at a point 41 feet south of N. E. corner of the N. W. quarter of said sec. 25 and running west 170 feet, south 300 feet, west 350 feet, south 500 feet, east 350 feet, south 700 feet, east 170 feet, north 1,500 feet to the place of beginning, containing $9\frac{7}{8}$ acres, valued at $345; also the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said sec. 25, valued at $300.00, all in town 10, range 6 east, in Lancaster Co., is valued at $1,295.00. Appraisers, Hoagland, sheriff; John McManigal, and Wm. Barr.

February 13, 1879.—*Vendi.* returned endorsed by said sheriff in substance as follows: That by reason of former levy upon the property described in return of May 18, 1878, and the command of this writ, the same containing an order to levy on other lands if those already levied on be insufficient, and deeming same insufficient, he, on the 2nd day of January, 1879, for want of goods and chattels, levied the same on the property described in the appraisal immediately preceding, and on January 11th, 1879, he caused notice to be published in the Nebraska State Journal that he would offer the same for sale on February 12, 1879, at 2 p. m., at the front door of the Academy of Music, in Lincoln, Neb., and did so offer the same and sold, to wit: Commencing at the S. E. corner of N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of sec. 25, 10, 6, in Lancaster Co., running thence east $33\frac{94}{100}$ rods, south $4\frac{78}{100}$ rods, thence east $6\frac{6}{100}$ rods, south $15\frac{22}{100}$ rods, west 40 rods, north 20 rods, containing $4\frac{81}{100}$ acres, to Irene Atkins for the sum of $300.00, the said Atkins having first bid

$40.00 for the said last-named piece of land and one J. G.
41 Miller bid $100.00 for the same, and the said $4\frac{81}{100}$ acres was struck off and announced by me as sold to the said Miller for the said sum of $100.00, at which time the said Atkins declared that he understood the said lands were being sold by the acre; that his said bid of $40.00 was for each acre of said $4\frac{81}{100}$ acres, and, by reason of such misunderstanding, I then and there again offered the said $4\frac{81}{100}$ acres for sale at public — and sold the same to Irene Atkins, as aforesaid, for the said sum of $300.00, *he* being the highest bidder therefor and said sum being more than two-thirds of the appraised value thereof, to which sale the said Miller excepted and demurred, that his said bid of $100.00 be taken, and he, the said Miller, tendered to me the sum of $100.00, in gold, as his said bid, which money *which money* I refused to take as the highest bid upon said property; and I offered the following-described land for sale at public auction and the same was bid off at said sale as follows, to wit, the N. E. ¼ of the N. W. ¼ of the N. E. ¼, sec. 25, T. 10, R. 6 E., 6th P. M., by J. G. Miller, at $400.00; also commencing at a point on the half quarter section line in the N. E. ¼ of said sec. 25, which runs north and south through the center of said quarter sec. 60 rods south of the north line of said quarter section, thence continuing as in the appraisal last above set forth, containing 10 acres aforesaid, bid off by J. G. Miller for $1,000.00; also the S. W. ¼ of N. W. ¼ of N. E. ¼ of said sec. 25 was bid off by Sidney C. Moton at the sum of $800.00; also commencing at a point 41 feet south of the N. E. corner of the N. W. ¼ of said sec. 25 (and continuing as set forth in the last preceding appraisal, containing 9⅞ acres), bid off by J. G. Miller for $600.00; also S. E. ¼ of N. W. ¼ of N. E. ¼ of sec. 25, 10, 6, bid off by Sidney C. Moton for the sum of $700.00, the said Miller and Moton being the highest and best bidders for said lands and said sums being more than two-thirds of the appraised value thereof, and after said sale was over I demanded from said
Moton and Miller the sums of money so bid by them on said
42 tract of land as aforesaid, and the said Moton and Miller each refused to pay the said sums so bid by them as aforesaid or any part thereof, and I having announced that the said sale would be for cash, I hereby return that the said lands were not sold by reason of no money being paid, excepting the said $4\frac{81}{100}$ acres, as aforesaid, sold to Irene Atkins for $300.00, and I hereby return this writ for want of time to again advertise the said lands under the same according to law, and hereby ask the clerk to issue a writ of *vendi.* directing the sale of the said lands, excepting the said $4\frac{81}{100}$ acres purchased by the said Atkins.

February 19, 1879.—*Vendi.* issued to Lancaster.

March 24, 1879.—*Vendi.* returned, endorsed by sheriff with sale of following-described property on March 22, 1879, at 2 o'clock, as follows: N. E. ¼ N. W. ¼ N. E. ¼, sec. 25, 10, 6, Lan. Co., Neb., containing ten acres, sold to Allen Field for $267.00; also commencing at a point on the ½ qr. section line in the N. E. qr. of said sec. 25 which runs north and south through the center of said qr. sec. 60 rods south of the north line of said qr. sec., thence south on said

qr. sec. line 40 rods, thence east 40 rods, north 40 rods, west 40 rods to place of beginning, containing ten acres, sold to Martha I. Courtney for the sum of $200.00; also S. W. ¼ of N. W. ¼ of N. E. ¼ of said sec. 25, sold to Martha I. Courtney for $234.00; also commencing at a point 41 feet south of N. E. corner of N. W. qr. of sec. 25, west 170 feet, south 300 feet, west 350 feet, south 500 feet, east 350 feet, south 700 feet, east 170 feet, north 1,500 feet to place of beginning, containing 9⅞ acres, sold to Martha I. Courtney for $230.00; also S. E. ¼ of N. W. ¼ of N. E. ¼ of sec. 25, containing 10 acres, to Martha I. Courtney for $200.00, all in Lancaster county, Nebraska. (Sale confirmed March 28, 1879. See J'n'l "F," 343.)

April 8, 1879.—Appraisal filed. November 6, 1879, appraisal filed for the property described in the following sheriff's return: Ap-
43 praised value, $670.00; Sheriff Hoagland, G. B. Skinner, and Squire Blazier, appraisers. December, 1879, execution returned by Sheriff Hoagland, endorsed in substance that on the 3rd day of November, 1879, for want of goods and chattels of defendant, he levied the same on the following-described property, to wit: Commencing at a point 50 feet east of the northeast corner of block 22, in Lavender's Addition to Lincoln, and running south 1,200 ft., east 50 feet, north 1,200 feet, west 50 feet, being a strip of land 50 feet wide and 1,200 feet long on 19th street, in Lincoln; also lot 2, in block 22, in Lavender's Addition to the city of Lincoln, Nebr.; also commencing at a point 100 ft. south of the S. E. corner of block 11, in Lavender's Addition to Lincoln, and thence running west on the south line of "L" street 100 feet to a starting point, thence south 142 feet, west 50, north 142 feet, east 50 to the starting point, containing one lot, known as lot 3, bl'k 10, Lavender's Addition to Lincoln, all in Lancaster Co., Neb. On Nov. 7, 1879, caused same to be advertised for sale in Nebraska State Journal on the 8th Dec., 1879, at 2 p. m., and on the said day offered the same for sale at the time and place so advertised, and the first piece of land above described was not sold for want of bidders. Lot two, in block 22, Lavender's Addition to Lincoln, sold to Martha I. Courtney for $167.00. The third piece of land above described sold to Martha I. Courtney for $800.00, she being the highest and best bidder therefor and that sum being not less than two-thirds of the appraised value.

STATE OF NEBRASKA, }
Lancaster County, } ss:

I, A. D. Burr, clerk of the district court of Lancaster county, Nebraska, do hereby certify that the above and foregoing are true and correct synopses of the issuance of executions and *vendi.* and of the sheriff's returns thereon in a cause in which Henry Atkins is plaintiff and Luke Lavender is def't, No. 790, Appr. Doc. C, 228; Ex. Doc. 50, 112 and 223, as same appears of record in said court.

44 Witness my hand and the seal of said court this Dec. 11th, 1883.

[SEAL.]

A. D. BURR,
Clerk D. C.
J. S. DALE, *Deputy.*

HENRY ATKINS
vs.
LUKE LAVENDER *et al.* } 1124. "D," 245; Ex. Doc. "C," 126.

June 30th, 1876.—Ord. sale issued to Lancaster Co. July 12, 1876; appraisal filed by Sam. McClay, sheriff, and Wm. Barr and D. B. Alexander, appraisers for the property described in the following return; appraised value, $300.00. September 18, 1883, order of sale returned endorsed in substance as follows: That on July 7 said sheriff caused notice to be published in the Nebraska State Journal that on Aug. 8th, 1876, he would offer the following-described lands for sale — front entrance to Academy of Music, Lincoln, Neb., where last term of said court was held, to wit: Commencing at a point 500 feet east of the N. E. corner of block 94, in the city of Lincoln, Lancaster Co., Nebr., and on a south line of a continuation of L street, thence running south on the east line of 18th street 300 feet to a point on the north side of a continuation of K, thence east on said continuation line of K street 100 feet north, 142 feet east, 50 feet south, 142 feet east, 150 feet to a point where 19th street crosses K street; thence north along the west line of 19th street 300 feet to L street, thence west on the south side of L street 300 feet to the place of beginning; and at the time and place so advertised sold the same to Henry Atkins for $350.00. June 24, 1878, sale confirmed and deed ordered. See J'n'l "E," 640. Deficiency judgment for $3,883.85. July 27, 1877, execution issued to Lancaster Co. and returned without endorsement. Sept. 15, 1877, execution issued to Lancaster Co. Sept. 19, 1877, copy of appraisal filed by sheriff and A. L. Palmer and J. H. Jerome, appraisers for the property described in the following return; appraised value, total, $1,268.75. Nov. 14, 1877, execu-
45 tion returned by sheriff of Lancaster Co. endorsed in substance as follows: Sept. 18, 1877, for want of goods and chattels this writ levied on the lands hereinafter named, and on Sept. 27, 1877, caused notice to be published that he would offer same for sale at public auction on Nov. 5th, 1877, at front entrance to Academy of Music, Lincoln, Neb., the building wherein last term of court was held, and at said time and place offered the same for sale and sold the same as follows: Commencing at a point 41 feet south from the N. E. corner of the N. W. ¼ of 25, 10, 6 E., and running thence west 170 feet, south 300 feet, west 350 feet, south 500 feet, east 300 feet, south 700 feet, east 170 feet, north 1,500 feet to the place of beginning, containing 9⅝ acres, to Sidney C. Moton for $34 per acre, amounting to $335.75; also commencing at a point 600 feet east from S. E. corner of block 94, city of Lincoln, and on a continuation of north line of "K" St., in said city, and running north 142 feet, east 50 feet, south 142 feet, west 50 feet to place of beginning, being a part of N. W. ¼ of sec. 25, 10, 6 E., sold to Sidney C. Moton for $25; also the S. E. ¼ of N. W. ¼ of N. E. ¼ of 25, 10, 6 E., containing 10 acres, sold to Sidney C. Moton for $40 per acre, $400.00; also commencing 60 rods south from N. W. corner east ½ of N. E. ¼ of 25, 10, 6 E., and running east 40 rods, south 40 rods, west 40 rods, north 40 rods to place of beginning, containing 10 acres, sold

to Sidney C. Moton for $41 per acre, $410.00, all in Lancaster Co., Neb. For confirmation see Court Journal "E," 205.

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, A. D. Burr, clerk of the district court of Lancaster, do hereby certify that the above is a true and correct synopsis of the issuance of executions and orders of sale and c., together with the substance of the sheriff's returns, in the case of Henry Atkins *vs.* Luke Lavender *et al.*, in the district court, as the same appears from the records and files of said court and now in my charge as clerk thereof.

Witness my hand and seal of said court this 12th day of December, 1883.

[SEAL.] A. D. BURR,
Clerk D. C.
46 J. S. DALES, *Deputy.*

EX. "D."

Block 9, in Lavender's Addition to Lincoln.

Lot 2, block 22, Lavender's Addition to Lincoln.

The southwest quarter (S. E. ¼) of the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of 25, 10, 6, in Lancaster Co., Neb., being 10 acres; also the southeast quarter (S. E. ¼) of the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼), 25, 10, 6, in said county, being about 5 acres on account of the creek; also 12½ acres (twelve and one-half acres) in section 25, 10, 6, in said county, across Antelope creek, and described by metes and bounds; also a strip of land 170 feet in width by 300 feet in depth on O street, between 19 and 20th streets, and described by metes and bounds; also lot 9, in block 9, Lavender's Addition to Lincoln.

EXHIBIT "E."

This indenture, made the 3rd day of July, A. D. 1878, between Luke Lavender, of the county of Lancaster, State of Nebraska, party of the first part, and E. Mary Gregory, of the same place, party of the second part, witnesseth:

That the said party of the first part, in consideration of the sum of fifty dollars and other good and sufficient consideration, the receipt whereof is acknowledged and confessed, have remised, released and bargained, sold and conveyed, and by these presents do, for themselves, their heirs, executors, and administrators, remise, release, sell, and convey, unto the said party of the second part and to her heirs and assigns forever all the following tract, piece, or parcel of land, situate in the county of Lancaster and State of Nebraska, to wit: The east half of the northwest quarter of the northeast quarter of section 25, town. 10 north, range six (6) east, in said county (save and except the northeast quarter of said described land upon which is the building and the residence of said Luke Lavender, and shall

contain five acres); to have and to hold the above-described
47 premises unto the said E. Mary Gregory, her heirs and assigns forever; and the said party of the first part, for themselves, their heirs, and administrators, do covenant to and — the said E. Mary Gregory that they are well seized of the above-described premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written, and that they are free and clear of and from all incumbrances whatsoever, except judgment and tax liens, and will warrant and defend the said premises to the said grantee, her heirs and assigns forever, against all lawful — and demands whatsoever, except judgment and tax liens and claim of J. O. Young.

In witness whereof the said parties of the first part have hereunto set *their* hands and seals the day and year first above mentioned.

LUKE LAVENDER.

Signed, sealed, and delivered in the presence of—
JOHN S. GREGORY.
J. S. GILL.

THE STATE OF OHIO, }
County of Delaware, } *ss:*

On this 3rd day of July, A. D. 1878, before me, J. S. Gill, a notary public duly appointed, commissioned, and qualified for and residing in said county, personally appeared Luke Lavender, to me known to be the identical person described in and whose name is affixed to the foregoing conveyance as grantor, and he acknowledged the said instrument to be his voluntary act and deed.

In testimony whereof I have hereunto set my hand and affixed my notarial seal, at Delaware, in said county, the day and year last above written.

[SEAL.]

J. S. GILL,
Notary Public.

48 EXHIBIT "F."

Know all men by these presents that E. Mary Gregory and John S. Gregory, in consideration of one dollar in hand paid, do hereby release and quitclaim unto Martha I. Courtney all their right, title, and interest in and to the following-described real estate, situate in the county of Lancaster and State of Nebraska, to wit, the southeast quarter (S. E. ¼) of the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of section 25, twenty-five, town. ten (10) north, range six (6) east, of the 6th P. M., in said county, together with all the tenements and appurtenances thereunto belonging.

Signed this 23rd day of August, 1880.

E. MARY GREGORY.
JOHN S. GREGORY.

In the presence of—
GEORGE GREGORY.

STATE OF NEBRASKA, } ss:
Lancaster County, }

On this 23rd day of August, 1880, before me, C. M. Parker, a notary public, duly appointed and qualified for and residing in said county, personally appeared John S. Gregory and E. Mary Gregory, to me known to be the identical persons described in and whose names are affixed to the foregoing conveyance as grantors, and acknowledged the same to be their voluntarily act and deed.

Witness my hand and notarial seal the date aforesaid.

[SEAL.] C. M. PARKER, *N. P.*

Endorsed: Luke Lavender *vs.* Henry Atkins *et al.* Amended answer. Clerk's office, district c't. Filed Oct. 11, 1884. E. R. Sizer, clerk D. C.

Reply.

In the District Court for Lancaster County, Nebraska.

LUKE LAVENDER }
vs.
HENRY ATKINS, MARTHA I. COURTNEY, and D. G. COURTNAY. }

49 Comes now the plaintiff and, replying to the defendants' answer herein filed, says that he denies each and every allegation of new matter in the defendants' answer contained; and the plaintiff, further replying, says that the said — resisted the said bankruptcy proceedings and refused to file or prove up their judgments in said bankruptcy proceedings, but utterly ignored the same and levied upon and fraudulently and wickedly sold and exhausted all of the plaintiff's property, as in plaintiff's petition alleged; and this plaintiff alleges that the said defendants are by reason of the premises estopped to assert that this plaintiff lost control of and over his property by reason of said bankruptcy proceedings; and this plaintiff further says that there is no subsisting assignee; that long anteror to the commencement of this suit the said bankruptcy proceedings were dismissed out of the United States district court and ceased to be of any force or effect in law and in nowise barred this plaintiff from legally asserting his rights to and preventing the sacrifice of his property by illegal execution sales or from bringing and prosecuting this action to set the same aside; that for a long time prior to the dismissal of said brankruptcy proceedings there had been no subsisting assignee; that the assignee there-fore existing had not taken possession of the property of this plaintiff or appropriated the same or made any provision for appropriating the same to the payment of the judgments on and over the property of this plaintiff, and that said bankruptcy proceedings were wholly abandoned by the assignee long prior to the dismissal of the same; and the plaintiff, further replying, says that the pretended deed from this plaintiff to one E. Mary Gregory of and to the southeast quarter of the northwest quarter of the northwest quarter of section twenty-five, town. ten north, of range six, with other property was

procured by this plaintiff by one John S. Gregory, husband of the said E. Mary Gregory, through false and fraudulent representations of his, the said John S. Gregory, to this plaintiff touching
50 the condition of the estate of this said plaintiff when this plaintiff was in the State of Ohio and was wholly ignorant of the facts and conditions of his said property in Lancaster county, Nebraska, and was unable to come to Nebraska to obtain the real status and condition of his said property. The said Gregory, among other false and fraudulent representations, represented to this plaintiff that such a conveyance — imperatively necessary to the protection of the plaintiff's interests in said property; that he, the said Gregory, as the attorney of this plaintiff, could, if intrusted with said conveyance, save for this plaintiff a portion of his said estate; that one James E. Philpott, attorney of this plaintiff, was wholly neglecting this plaintiff's interest in said property and confederating with other persons to defraud this plaintiff out of said property; all of which representations were at the time of making the same false and fraudulent, which the said Gregory then knew, yet this plaintiff was induced and did rely upon the same as being true; and this plaintiff alleges the fact to be that said Gregory, notwithstanding said fraudulent and false representations, procured the said conveyance for the sole purpose of furthering his schemes to cheat and defraud this plaintiff out of said property; that instead of using said conveyance to aid this plaintiff he used the same for the purpose of furthering the interests of himself and the said E. Mary Gregory to the exclusion of this plaintiff; and the plaintiff further says that said Martha I. Courtnay was fully advised of the fraudulent manner in which said Gregory obtained said conveyance from this plaintiff at the time of taking said conveyance from said E. Mary Gregory and John S. Gregory; that said Martha I. Courtney was not a *bona fide* purchaser of said property from said Gregory; that she paid no consideration therefor; that the conveyance to her by said Gregory is by quitclaim deed; that her title to said premises is not aided or strengthened by said conveyance from said Gregories, and that said conveyance should be set aside and held for naught by reason
51 of the premises. Wherefore plaintiff asks judgment as prayed in his petition.

LAMB, RICKETTS AND WILSON,
Attorneys for Plaintiff.

STATE OF NEBRASKA, } ss:
Lancaster County, }

A. C. RICKETTS, being first duly sworn, on his oath says he is one of the attorneys of the said plaintiff; that said plaintiff is now absent from said county; that affiant has read the foregoing reply and believes the — alleged therein to be true.

A. C. RICKETTS.

Subscribed in my presence and sworn to before me this 19th day of February, 1885.

[SEAL.]

A. E. HOWARD,
Notary Public.

Endorsed: Luke Lavender *vs.* Henry Atkins *et al.* Reply. Clerk's office, district c't. Filed Feb. 23, 1885. E. R. Sizer, clerk D. C.

Journal Entry.

That on the 5th day of November, A. D. 1885 (that being the 20th day of the October, A. D. 1885, term of said court), were had and done the following proceedings herein, as appears upon Court Journal "L," at page 358, to wit:

LUKE LAVENDER *vs.* HENRY ATKINS, MARTHA I. COURTNAY, and D. G. COURTNEY.	3542.	L. 125.

This 5th day of November, A. D. 1885, came on this cause to be decided; and thereupon the court finds the facts upon the issues joined in favor of the plaintiff as to those lands described as the southwest quarter of the northwest quarter of the northeast quarter of section twenty-five, township ten north, of range six east, in Lancaster county, Nebraska, and that the plaintiff is entitled to redeem the same and to be restored to the possession thereof upon the
52 payment within six months next ensuing of the sum of two hundred and thirty-four dollars, with interest thereon at the rate of seven per centum per annum from March 22, 1879, until the same is paid into court for said defendants; to which defendants except. It is therefore ordered, adjudged, and decreed that upon the payment by the plaintiff of said sum into court for the defendants within the time aforesaid the sheriff's sale of March 22, 1879, and deed to said lands, to wit, the southwest quarter of the northwest quarter of the northeast quarter of section twenty-five, township ten north, of range six east, in Lancaster county, Nebraska, be set aside, annulled, and held for naught and the title to said lands be quieted in the plaintiff as against all claims or title that said defendants or either of them and all persons holding or claiming to hold under them or either of them may have or claim to have under and by virtue of said sale and deed, and that the defendants and each of them convey to plaintiff all right, title, and interest by them or either of them held or claimed in and to said lands by virtue of said sale and deed and that plaintiff have possession of said lands and execution therefor, and that in default of the plaintiff making such payment within the time aforesaid it is ordered, adjudged, and decreed that the title in and to the said lands, to wit, the southwest quarter (¼) of the northwest quarter of the northeast quarter of section twenty-five, town. ten, range 6 east, in Lancaster county, Nebraska, be quieted in the defendant, Martha I. Courtney; to which defendants except. This decree, however, is not to affect any judgment or execution lien or liens which said defendants or either of them may have or hold on said lands; and plaintiff excepts thereto and prays an appeal therefrom, which is allowed; and the court further finds as to the rest and residue of said lands in the petition described the issues joined in favor of the defendants and against the

plaintiff; and it is further ordered and decreed that the title in and to all the rest and residue of said lands in the petition de-
53 scribed be quieted in the defendants; and plaintiff excepts thereto and prays an appeal, which is allowed; and the court further adjudges and decrees that each party, plaintiff and defendants, pay one-half the costs of this action, taxed at $80.50. Thereupon the parties each severally prays an appeal from so much of the decree as is adverse to them, and the appeals so prayed are allowed, and supersedeas bond of plaintiff is fixed in the sum of one thousand dollars and bond on part of defendant is fixed in the sum of five hundred dollars, the same severally to be filed within 20 days, and the parties are each given 40 days from the rising of the court to reduce exceptions and evidence to writing.

S. B. POUND, *Judge.*

[On margin:] See modification of decree Dec. 28th, 1885. J'n'l L, 515.

Stipulation to Dismiss.

In the District Court of Lancaster County, in the State of Nebraska.

LUKE LAVENDER
vs.
HENRY ATKINS, MARTHA I. COURTNEY, and D. G. COURTNEY.

This cause is settled and the judgment and decree rendered in the district court of Lancaster county is in all things affirmed, and all errors are waived by the plaintiff, and the said plaintiff waives that part of the decree in this case which gives said plaintiff the right to redeem certain parts of said premises mentioned in said decree, and the said Luke Lavender and wife deed all of said premises mentioned in the said decree to D. C. Courtney, and defendants herein agree to pay all the costs, and judgment is rendered for the same in favor of the plaintiff.

D. G. COURTNEY,
Att'y for Def'ts.
LUKE LAVENDER.

This 18th day of December, 1885.

54 Witnesses:
J. V. ATKISSON.
E. P. CAMPBELL.

Endorsed: Lavender *vs.* Atkins *et al.* Stipulation to dismiss. Clerk's office, district c't. Filed Dec. 21, 1885. E. R. Sizer, clerk D. C.

Journal Entry.

That on the 28th day of December, A. D. 1885 (that being the 45th day of the October, A. D. 1885, term of said court), were had and done the following proceedings herein, as appears upon Court Journal "L," at page 515, to wit:

LUKE LAVENDER
vs.
HENRY ATKINS, MARTHA I. COURTNEY, and D. G. COURTNEY. } 3542. L. 125.

This day come the defendants with the written stipulation filed herein, which is in the words and figures following, to wit: This cause is settled and the judgment and decree rendered in the district court of Lancaster county is in all things affirmed and all errors are waived by the plaintiff, and the said plaintiff waives that part of the decree in this cause which gives said plaintiff the right to redeem certain parts of said premises mentioned in the said decree, and the said Luke Lavender and wife deeds all of said premises mentioned in the said decree to D. G. Courtney, and defendants herein agree to pay all the costs, and judgment is rendered for the same in favor of the plaintiff this 18th day of December, 1885.

D. G. COURTNEY,
Att'y for Def't.
LUKE LAVENDER.

Witnesses:
J. V. ATKISSON.
E. P. CAMPBELL.

[On margin:] See decree Nov. 5, 1885, J'n'l "L," 358.

It is therefore considered by the court that so much of the decree rendered in the cause November 5th, 1885, as finds in favor of the plaintiff as to the southwest quarter of the northwest quarter of the northeast quarter of section numbered twenty-five (25), in township ten (10) north, in range six (6) east, in Lancaster county, Ne-
55 braska, and the rights given plaintiff to redeem the same and all errors taken by plaintiff *is* hereby set aside and held for naught, and that the plaintiff have and recover from Henry Atkins, Martha I. Courtney, and D. G. Courtney the costs of this suit, taxed at $80.50.

Certificate.

THE STATE OF NEBRASKA, } *ss:*
Lancaster County, }

I, E. R. Sizer, clerk of the district court, second judicial district of Nebraska in and for said county, do hereby certify that the above and foregoing are true and correct copies of the petition filed April 17th, A. D. 1884; the amended answer filed October 11th, A. D. 1884; the reply filed February 23rd, A. D. 1885, and the stipulation filed December 21st, A. D. 1885, with all the endorsements on each, together with decrees of court rendered on November 5th, A. D, 1885, and on December 28th, A. D. 1885, in a cause in said court, wherein Luke Lavender is plaintiff and Henry Atkinson, Martha I. Courtney, and D. G. Courtney are defendants, as the same appear fully upon the records and files of said court and now in my charge as clerk thereof.

In testimony whereof I have hereunto set my hand officially and attached the seal of said court, at Lincoln, this 18th day of January, A. D. 1888.

[SEAL.] E. R. SIZER,
Clerk D. C.

Fees, $15.00.

That the consideration received by the said Luke Lavender and paid and given by the said Dominic G. Courtnay for the settlement of the said suit under the said stipulation and the delivery of the said deed of conveyance to him by the said Luke Lavender and Julia A. Lavender, his wife, as above found, was the sum of five hundred dollars, cash paid to Lavender by said Courtnay, and
56 the discharge and release by said Courtnay and Martha I. Courtnay and Henry Atkins of all the judgments held by them or any of them against the said Luke Lavender, amounting in the aggregate to about the sum of fourteen thousand dollars.

We further find and say that at the November term, A. D. 1873, of the district court of the 2nd judicial district of Nebraska within and for Lancaster county, in the State of Nebraska, Henry Atkins received a judgment against Luke Lavender and others for the sum of $2,083 and costs of suit, taxed at $37.50, and that execution was issued thereon and out of said court and under the seal thereof and the premises in controversy levied upon as the property of Luke Lavender and advertised and sold according to law to Martha I. Courtnay, and sale confirmed and deed ordered; and in pursuance of said order the sheriff of said county, Gran. Ensign, made, executed, and delivered to Martha I. Courtnay a sheriff's deed conveying to said Martha I. Courtnay, her heirs and assigns, all the estate, right, title, and interest in and to the lands and tenements described in the plaintiff's petition which said Luke Lavender was seized and possessed of on the 4th day of November, 1873, or at any time thereafter, which deed was dated April 27th, 1881, and was made, executed, and delivered on said date and filed for record in the office of the county clerk of Lancaster county April 27th, 1881, which said deed is hereto attached and made a part of this verdict.

And we further find that in the month of September, A. D. 1879, Henry Atkins made, executed, and delivered to Martin I. Courtnay a deed of conveyance of said premises, which said deed is lost. Yes.

And we further find and say that Martha I. Courtney, by deed of conveyance duly executed on the 15th day of January, A. D. 1888, conveyed said premises to Dominic G. Courtnay; which said deed is hereto attached and made a part of this verdict. Yes.

And we further find and say that on the 18th day of De-
57 cember, A. D. 1885, Luke Lavender and Julia S. Lavender, his wife, made, executed, and delivered to Dominic G. Courtnay a warranty deed, including the premises described in the plaintiff's petition; which said deed was filed for record and recorded in the office of the county clerk of Lancaster county in Deed Record 24, at page 618, a certified copy of which deed is hereto attached and made a part of this verdict. Yes.

We further find and say that on the 5th day of November, A. D. 1885, that being the 20th judicial day of the October term, 1885, of the district court of Lancaster county, Nebraska, the proceedings were had and done in the case of Luke Lavender *vs.* Henry Atkins — Martha I. Courtnay, as set forth in the transcript of the record hereto attached. Yes.

6. And we further find and say that Luke Lavender did not pay within six months next accruing of the said decree the sum of $234, with interest thereon, at the rate of 7 % per annum, from March 22nd, 1879, neither did any person pay or offer to pay the same, and no sum of money whatever has ever been paid as required by the terms of said decree. Yes.

7. We, the jury, further find and say that Henry Atkins and his grantees have had open, notorious, continuous, and visible possession of all of said premises described in plaintiff's petition from April 1st, 1876, to the time of commencement of this action. Yes.

And we further find that the defendant and his grantors, Henry Atkins and Martha I. Courtnay, have paid the taxes on said land in controversy from and including the year 1876 down to the present time. Yes.

We further find and say that 60 feet in width and forty rods in length of the one hundred feet in width and forty rods in length which was deeded to the plaintiff by Lavender for a street has been dedicated to the public for a street by the defendant herein
58 and is known as a continuation of M street, as shown by the plat of said land, called Arondale Addition, hereto attached. Yes.

WM. ANDERSON, *Foreman.*

Deed Record 24, page 618.

Warranty Deed.

Luke Lavender and Wife
—
D. G. Courtnay.

Filed for record Dec. 21, 1885, at 4 o'clock p. m.

J. H. McCLAY,
County Clerk.
O. C. BELL, *Dep.*

Fees, $1.25.

Know all men by these presents that we, Luke Lavender and Julia Lavender, his wife, of Custer county and State of Nebraska, in consideration of the sum of five hundred dollars in hand paid by D. G. Courtnay, of Lancaster county and State of Nebraska, do hereby sell and convey unto the said D. G. Courtnay the following-described premises, situate in the county of Lancaster and State of Nebraska, to wit: The southeast quarter of the northwest quarter of the northeast quarter; also the southwest quarter of the northwest quarter of the northeast quarter, all in section 25, town. 10, range 6 east; also

commencing at a point on the half quarter section line in the northeast quarter of section 25, town. 10, range 6 east, which runs north and south through the center of said quarter section 60 rods south of the north line of said quarter section and running thence south on said quarter line 40 rods, thence east 40 rods, thence north 40 rods, thence west 40 rods; also commencing at the S. E. corner of the N. E. ¼ of the N. W. ¼ of the N. E. ¼ of sec 25, town. 10, range 6 east, then east 33.94 rods, thence south 4.78 rods, then east 6.6 rods, thence south 15.22 rods, thence west 40 rods, then north 20 rods, all being in sec. 25, town. 10, range 6 east; also lot 2, in block 22, Lavender's Addition to Lincoln, commencing at a point 500 feet east of the northeast corner of block 94, in Lincoln, Lancaster county, Nebraska, and on the south line of a continuance of "L" street,
59 thence running south on the east line of 18th street 300 feet to a point on the north side of a continuation of "K" street, thence east on said continuation line of "K" street 100 feet, thence north 142 feet, thence east 50 feet, thence south 142 feet, thence east 150 feet to a point where 19th street crosses "K" street, thence north along west line of 19th street 300 feet to "L" street, thence west along south line of "L" street 300 feet to the place of beginning, being a part of section 25, town. 10, range 6, in Lancaster county, Nebraska.

And we do hereby covenant with the said D. G. Courtney that we hold said premises by good and perfect title and have good right and lawful authority to sell and convey the same; that they are free and clear of all liens aud incumbrances and taxes now due, and we covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever, and the said Julia Lavender, wife aforesaid, hereby relinquishes her right of dower in and to the above-described premises.

Signed this 18th day of December, A. D. 1875.

LUKE LAVENDER.
JULIA A. LAVENDER.

In presence of—
E. P. CAMPBELL.
I. N. ATKINSON.

THE STATE OF NEBRASKA, } ss:
Custer County, }

Before me, the undersigned, a notary public in and for said county, personally appeared Luke Lavender & Julia A. Lavender, who personally are known to me to be the identical persons described in and who executed the foregoing deed as grantors, and acknowledged said instrument to be their voluntary act and deed.

Witness my hand and notarial seal this 18th day of December, 1885.

[E. P. Campbell, Notarial Seal, Custer County, Nebraska.]

E. P. CAMPBELL,
Notary Public.

60 STATE OF NEBRASKA, } ss:
Lancaster County, }

I, Jno. D. Knight, register of deeds of said county, hereby certify that the above and foregoing is a true and correct copy of deed as appears of record in this office in Deed Record 24, at page 618.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at the city of Lincoln, this 10th day of Nov., A. D. 1888.

[SEAL.]

JNO. D. KNIGHT,
Register of Deeds.
J. M. FAWELL, *Deputy.*

Sheriff's Deed.

Know all men by these presents that whereas at the November term, A. D. 1873, of the district court, 2nd judicial district, within and for Lancaster county, in the State of Nebraska, Henry Atkins, plaintiff, recovered a judgment against Luke Lavender and others, defendants, for the sum of two thousand and eighty-three dollars and costs of suit, taxed at thirty-seven & $\frac{50}{100}$ dollars;

And whereas by virtue of an execution issued by A. D. Burr, the clerk of the district court within and for Lancaster county, Nebraska, and under the seal thereof, bearing date the second day of January, A. D. 1879, and directed to the sheriff of said Lancaster county, Nebraska, commanding him to cause to be levied of the goods and chattels, and for want thereof of the lands and tenements, of the said Luke Lavender, defendant, sufficient to satisfy the said Henry Atkins, plaintiff, judgment and costs as aforesaid, together with interest on said judgment from the fourth day of November, A. D. 1873, and all accruing costs, the sheriff as aforesaid did, on the second day of January, A. D. 1879, for want of goods and chattels, levy on and seize the following lands and tenements of the said Luke Lavender, defendant, to wit:

61 The southwest quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) of section No. twenty-five (25), town. No. ten (10) north, of range No. six (6) east, 6th P. M., containing 100 acres; also commencing at a point of the half quarter-section line in the northeast quarter of section 25, town. 10 N., of range 6 east, 6th P. M., which runs north and south through the centre of said quarter section 60 rods south of the north line of said section, and running thence south on said quarter-section line 40 rods, thence east 40 rods, thence north 40 rods, thence west 40 rods to place of beginning, containing 10 acres; also the southeast quarter of the northwest quarter of the northeast quarter of section 25, town. 10 north, of range 6 east, 6th P. M., containing 10 acres; also commencing at a point 41 feet south of the northeast corner of the northwest quarter of said section 25, thence running west 170 feet, thence south 300 feet, thence west 350 feet, thence south 500 feet, thence east 350 feet, thence south 700 feet, thence east 170 feet, thence north 1,500 feet to place of beginning, containing 9$\frac{7}{8}$ acres, all in Lancaster county, Nebraska;

And whereas the said sheriff as aforesaid, under & by virtue of a *vendi.* issued by the clerk of said court in said action, on the 19th day of February, A. D. 1879, did, on the 22nd day of March, A. D. 1879, at the front entrance of the "Academy of Music," "O" street between 10th and 11th streets, in the city of Lincoln, in said county of Lancaster (that being the place where the last term of said district court was held), having first summoned two disinterested freeholders, residents of said Lancaster county, and having administered to them an oath impartially to appraise said lands and tenements upon actual view thereof, and the said sheriff, together with the said freeholders, having made an appraisement in writing of said lands and tenements, and having first given due and legal notice of the time and place of said sale for not less than thirty days prior thereto in the Nebraska State Journal, a newspaper printed in and in gen-
62 eral circulation in said county of Lancaster, sell the said lands and tenements, at public auction, to Martha I. Courtnay for the sum of eight hundred and sixty-four dollars, she being the highest bidder therefor and said last-mentioned sum being not less than two-thirds of the appraised value thereof; which sale was afterwards, at the adjourned May term of said district court, A. D. 1880, examined and confirmed by the said court, and the said Gran. Ensign, sheriff of said Lancaster county, ordered by the said court to make a deed of the said lands and tenements to the said Martha I. Courtnay:

Now, therefore, I, the said Gran. Ensign, sheriff of the county of Lancaster, as aforesaid, in consideration of the premises and by virtue of the powers vested in me by law, do hereby give, grant, and convey to the said Martha I. Courtnay, — heirs and assigns, all the estate, right, title, and interest in and to the lands and tenements sold as aforesaid of which the said Luke Lavender, defendant, was seized and possessed on the fourth day of November, 1873, or any time thereafter, to wit: The southwest quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) of section No. 25, town. No. 10 north, range 6 east, of 6th P. M., containing 10 acres; also commencing at a point on the half quarter section line in the northeast quarter of sec. 25, town. 10 north, range 6 east, which runs north and south through the center of said quarter section 60 rods south of the north line of said section and running thence south on said quarter-section line 40 rods, thence east 40 rods, thence north 40 rods, thence west 40 rods to place of beginning, containing 10 acres; also the southeast quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) of section 25, town. No. 10 north, range 6 east, of 6th P. M., containing 10 acres; also commencing at a point 41 feet south of the northeast corner of the northwest quarter of said section No. 25, thence running west 170 feet, thence south 300 feet, thence west 350 feet, thence south 500 feet, thence east 350 feet, thence south 700 feet, thence east 170 feet, thence north 1,500 feet to place of
63 beginning, containing 9$\frac{5}{8}$ acres, all in Lancaster county, Nebraska, with all the appurtenances thereunto belonging; to have and to hold the same to the said Martha I. Courtnay, her heirs and assigns, and to them and their use and behoof forever.

In testimony whereof I have, as such sheriff, hereunto set my hand this 27th day of April, A. D. 1881.

GRAN. ENSIGN,
Sheriff of Lancaster Co., Nebraska.

Executed in presence of—
A. D. BURR.

THE STATE OF NEBRASKA, }
Lancaster County, } *ss:*

On this 27th day of April, A. D. 1881, before me, A. D. Burr, clerk of the district court held within and for said county, personally appeared Gran. Ensign, sheriff of said county, to me well known to be the identical person described in and who executed the foregoing instrument of conveyance, and who acknowledged the said instrument to be his voluntary act and deed as said sheriff for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this twenty-seventh day of April, A. D. 1881.

[SEAL.] A. D. BURR,
Clerk Dist. Court, Lancaster County, Nebraska.

Endorsed: Sheriff's deed. Gran. Ensign, sheriff, to Martha I. Courtnay. Dated April 27th, 1881. State of Nebraska, Lancaster county, *ss:* Entered on numerical index and filed for record this 27th day of April, A. D. 1881, at 2.20 o'clock p. m., and recorded in the office of the clerk of said county, in Book No. 1 of Deeds, on page 193. L. E. Cropsey, clerk. 1.50, paid. J. N.

Know all men by these presents that I, Martha I. Courtnay, of Lancaster county, State of Nebraska, in consideration of the sum of five hundred dollars in hand paid by Dominic G. Courtnay,
64 of Lancaster county and State of Nebraska, do hereby sell and convey unto the said Dominic G. Courtney the following-described premises, situated in the county of Lancaster and State of Nebraska and city of Lincoln, to wit: The southwest quarter (S. W. ¼) of the northwest quarter (N. W. ¼), section 25, town. ten (10), range 6 east, of 6 P. M., known as Arondale Addition to the city of Lincoln, together with all the tenements, hereditaments, and appurtenances to the same belonging and all the estate, right, title, interest, dower, claim, or demand whatsoever of the said Martha I. Courtnay, of the first part, of, in, or to the same or any part thereof; to have and to hold the above-described premises unto the said Dominic G. Courtnay and to his heirs forever; and I hereby covenant that said premises are free and clear of all liens and incumbrances and all taxes now due.

And I do covenant to warrant and defend the said premises against any acts of said parties of the first part, and the said — hereby relinquish- her right of dower in and to the above-described premises.

Signed this 16th day of January, A. D. 1888.

MARTHA I. COURTNAY.

Signed in presence of—
J. H. McCLAY.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

On this 16th day of January, 1888, before me, J. H. McClay, a notary public duly appointed, qualified for, and residing in said county, personally came the above-named Martha I. Courtnay, who is also personally known to me to be the identical person described in and whose name — affixed to the foregoing instrument as grantor, and she acknowledged the same to be her voluntary act and deed for the purposes therein stated.

Witness my hand and seal, at Lincoln, on the date last above mentioned.

[SEAL.] J. H. McCLAY,
Notary Public.

(Here follow maps marked pp. 65 & 66.)

67 Thereupon, afterwards, to wit, on the 28th day of January, 1889, motion for judgment was filed in said case; which said motion is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JASON G. MILLER
vs.
DOMINIC G. COURTNAY. } Motion for Judgment on Verdict.

Comes now the defendant and moves the court to enter up judgment for the property in question for the defendant on the verdict heretofore rendered, and for costs in this action.

O. P. MASON & D. G. COURTNAY,
For Defendant.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 357. L. In circuit court U. S., Nebraska. James G. Miller *vs.* Dominic G. Courtnay. Motion for judgment on the verdict for defendant. Filed Jan. 28, 1889. Elmer D. Frank, clerk. O. P. Mason and D. G. Courtnay, att'ys for def't.

Thereupon, afterwards, to wit, at the November term of said court, on the 16th day of November, 1889, the following proceedings were had and done in said cause, as appears of record on folio 899, Journal "N," of said court, to wit:

JASON G. MILLER
vs.
DOMINIC G. COURTNAY. } Judgment on Verdict. No. 357. L.

The jury in this action having on the 24th day of January, 1889, rendered a verdict for the defendant and against the plaintiff for the possession of the premises described in the petition and verdict herein, on motion of said defendant, by Mason and Courtnay, his attorneys, it is considered, ordered, and adjudged by the court that the de-

fendant is entitled to judgment on said verdict, and that
68 said defendant is the owner of and entitled to the immediate possession of said premises and was at the commencement of this suit and now is the owner thereof, and that said defendant, Dominic G. Courtnay, have and recover the same of and from said plaintiff, Jason G. Miller, and a writ of possession is awarded to place said defendant in possession of said premises.

It is further ordered that said defendant recover of and from said plaintiff his costs herein expended, taxed at $—, and that execution issue therefor.

Thereupon, afterwards, to wit, on the 4th day of February, 1890, affidavit as to value was filed in said case; which said affidavit is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JASON G. MILLER, Plaintiff,
vs.
DOMINIC G. COURTNAY.

STATE OF NEBRASKA, *Lancaster*, } *ss:*

W. W. HOLMES, JOHN MCCLAY, and F. A. BOEMER, being respectively first duly sworn, on their oaths say they have each been engaged in the real-estate business in the city of Lincoln for several years last past and know the value of real estate in and about the city of Lincoln; they are personally acquainted with the following-described premises: All that portion of the southwest quarter of the northwest quarter of the northeast quarter of section No. 25 of township No. 10 north of range No. 6 east of the 6 P. M. which lies north of the north line of a continuation of M street as the same is located through the city of Lincoln, being a strip of land about 80 feet wide by 40 rods long, and also are each personally acquainted with the following tract of land lying adjacent
69 thereto, to wit: Commencing at a point 650 feet east of southeast corner of block numbered 19 of Lavender's Addition to the city of Lincoln for a commencement point, thence east 40 rods, thence south 100 feet, thence west 40 rods, thence north 100 feet to the place of beginning, and they are respectively acquainted with the value of said premises; and affiant W. W. Holmes for himself says that the first above description is of the value of $6,000 and the second above description is of the value of $1,000.

And affiant John McClay for himself says that the first above-described premises is of the value of $8,000 and the second above description is of the value of $6,000.

And affiant F. A. Boemer for himself says that the first above description is of the value of $5,400 and the second above description is of the value of $3,000.

And further these affiants say not.

W. W. HOLMES.
J. H. McCLAY.
F. A. BOEHMER

Subscribed in my presence and sworn to before me this 3rd day of February, A. D. 1890.

[SEAL.] M. A. CAMERON,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 357. L. Jason G. Miller *vs.* Dominic G. Courtnay. Affidavits of value. Filed Feb. 4, 1890. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 4th day of February, 1890, a writ of error was allowed in said case and a citation issued thereon, of which said writ of error and citation the following are the originals thereof:

70 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Jason G. Miller, plaintiff, and Dominic G. Courtney, defendant, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at Lincoln, in said district, this 4th day of February, 1890.

ELMER D. FRANK, *Clerk.*

Allowed by—
ELMER S. DUNDY, *Judge.*

Cost bond to be given in sum of $300.

[Seal United States Circuit Court, District of Nebraska.]

ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 357. L. United States circuit court, district of Nebraska. Jason G. Miller *vs.* Dominic G. Courtney. Writ of error. Filed Feb. 4, 1890. Elmer D. Frank, clerk.

71 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To Dominic G. Courtney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Jason G. Miller is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Lincoln, this 4th day of February, 1890.

ELMER S. DUNDY, *Judge.*

On this 20th day of February, 1890, personally appeared William Hepfinger and says that he did on the 15th day *day* of February, 1890, deliver an original of this writ to the above-named Dominic G. Courtney, at Lincoln, in Lancaster county, Nebraska.

Sworn to before me this 20th day of February, A. D. 1890.

E. D. FRANK,
Clerk U. S. Circ't Court.

[Endorsed:] No. 357. L. United States circuit court, district of Nebraska. Jason G. Miller *vs.* Dominic G. Courtney. Citation. Filed Feb. 4, 1890. Elmer D. Frank, clerk. Rec'd Feb. 20, 1890. Lincoln.

Service	2 00
R. R. fare	3 30
Subsistence	1 00
Total	$6 30

72 Thereupon, afterwards, to wit, on the 14th day of February, 1890, a bond was filed in said case; which said bond is in words and figures following, to wit:

Bond.

Know all men by these presents that we, Walter J. Lamb and Arnott C. Ricketts, are held and firmly bound unto Dominic G. Courtnay in the full and just sum of five hundred dollars, to be paid to the said Dominic G. Courtney, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of February, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Jason G. Miller & Dominic G. Courtnay, judgment was rendered against the said Jason G. Miller, and the said Jason G. Miller having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Dominic G. Courtnay, citing and admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Jason G. Miller shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WALTER J. LAMB.
ARNOTT C. RICKETTS.

Approved by—
ELMER S. DUNDY, *Judge.*

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 357. L. United States circuit court, district of Nebraska. Jason G. Miller *vs.* Dominic G. Courtnay. Bond. Filed Feb. 14, 1890. Elmer D. Frank, clerk.

73 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

In pursuance to the foregoing writ of error and in obedience thereto I, Elmer D. Frank, clerk of the circuit court of the United States for said district of Nebraska, within the eighth circuit, do hereby certify that the foregoing folios, from one to 72, contain true and faithful transcripts from the records and files of said court in the case of Jason G. Miller *vs.* Dominic G. Courtnay, and that a copy of the writ of error and citation has been lodged and remains in my said office.

Seal United States Circuit Court, District of Nebraska.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 26th day of July, A. D. 1890.

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 1251. Jason G. Miller, plaintiff in error, *vs.* Dominic G. Courtnay. Filed August 28, 1890.

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JAMES H. McKENNEY,
CLERK.

CASE NO. 14,256.

Term No. 242.

UNITED STATES SUPREME COURT.

October Term, 1893.

HENRIETTA SNELL, *et al.*, *plaintiffs in error*,

v.

THE CITY OF CHICAGO, *et al.*, *defendants in error.*

In Error to the Supreme Court of Illinois to Reverse decision Reported as
Snell v. *City of Chicago*, 133 Ill. 413.

BRIEF FOR DEFENDANTS IN ERROR.

HARRY RUBENS,
Corporation Counsel of the City of Chicago.

EDWARD ROBY.
Counsel.

BARNARD & GUNTHORP, PRINTERS, CHICAGO

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.ismissing the bill

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THE CITY OF CHICAGO, *et al.*, *defendants in error*.

In Error to the Supreme Court of Illinois to Reverse decision Reported as

Snell v. *City of Chicago*, 133 Ill., 413.

BRIEF FOR DEFENDANTS IN ERROR.

The scope of inquiry by this court, in this case, is limited by the assignment of errors, and by the law, to questions arising under the Constitution of the United States.

Rec. 82: The assignment of errors is in two paragraphs, charging—

(1.) That the Act of the Legislature of Illinois, providing for the annexation of territory to cities, approved April 25, 1889, and Section 12 of the Act to revise the law in relation to toll roads, approved March 25, 1874, and the City Ordinance of the City of Chicago, under which the Commissioner of Public Works of that City acted, are each in violation of Sec. 10 of Article 1 of the U. S. Constitution, prohibiting any state from passing any law impairing the obligation of contracts; and also in violation of Sec. 1 of the 14th Amendment, prohibiting any state from depriving any person of property without due process of law.

(2.) That the decree of the Superior Court of Cook County, Illinois, and the judgment of the Supreme Court of Illinois, are erroneous because based upon statutes of Illinois, and an ordinance of Chicago, which are each in violation of the Constitution of the United States, and, therefore, null and void.

The decree mentioned, which was affirmed by the Supreme Court of Illinois, is a decree sustaining a general demurrer to an amended bill in chancery, and (complainants' electing to stand by their bill) dismissing the bill for want of equity. (Rec., 59.)

The franchises of the City of Chicago, and of all the cities in the State of Illinois, the powers of all cities as municipal corporations, and the power of the State of Illinois to pass general laws for the good of the whole people, were assailed by a bill in chancery; the City demurred; and the Circuit and Supreme Courts of the State held that the bill ought to be dismissed upon the demurrer.

The plaintiffs in error had elected to stand by their bill after having amended it September 16, 1889 (Rec., 55), and again January 28, 1890, and after the judgment had been pronounced upon the matter of law arising on the demurrer, and the bill was dismissed: therefore we have the entire case, of plaintiffs in error, presented by their bill; which is to be considered under the rule of law, that upon a demurrer to a pleading, *all averments are taken most strongly against the pleader; and all things which are necessary to the right asserted, and which are not pleaded, are admitted not to exist.* (Dougherty v. Catlett, 129 Ill., 432; Woodworth v. Paine Breese, 1 Ill., 295; Peipho v. Peipho, 88 Ill., 438; West v. Schnebly, 54 Ill., p. 525; Lawrence v. Traine, 136 Ill., p. 484.)

The bill as amended consists of the matter printed on pages 5–11; a map printed at page 22 as Exhibit A, which is made part of the bill at page 15; a petition printed at page 22, which is made part of the bill at page 17; a full report of proceedings of the City Council of Chicago printed on pages 22–50, and made a part of the bill by reference at page 18, only for the purpose of introducing *nine* lines which are found on page 44; also *amendments to the bill* printed at pages 55 and 56 to 58 of the printed Record.

The learned counsel for plaintiffs in error have not made a complete statement of the case, but have left this court to grope for some of the leading facts among 58 pages of printed matter, one half of which is entirely irrelevant; and to place the amendments where they apply in the bill, though there is nothing but their sense to indicate the connection in which they are to be read in the bill.

To enable the court easily to understand the case, it is necessary for defendants in error to present the following

inserting each amendment and exhibit in its proper place. With notes upon certain allegations, upon their legal effect. Thus furnishing a running commentary to the bill itself.

The Acts, (of which parts are copied in the bill) are printed in full as an appendix to this brief.

Rec. 5. *The Bill*, brought by the administrators, widow and heirs of Amos J. Snell, deceased, against the City of Chicago and its Commissioner of Public Works, began by alleging, in haec verba, fourteen Sections of an Act of the Legislature of Illinois, approved February 10, 1849, entitled "An Act to incorporate the Chicago Southwestern Plank Road Company".

NOTE. The Chicago Southwestern Plank Road Company, so incorporated, had nothing to do with the Northwestern Plank Road Company, and its road began at a considerable distance from the Northwestern Plank Road, concerning which the bill was exhibited.

Rec. p. 7. *The Bill* proceeds, at the foot of page 7, to aver, that by the 21st, 22nd and 23rd Sections of an Act of the Legislature of Illinois, approved February 12, 1849, entitled "An Act to construct a Plank Road from Oswego in Kendall County to the Indiana State Line by way of Joliet in Will County," it was enacted as follows: Then follow verbatim the three sections purporting to incorporate the Northwestern Plank Road Company, reciting that the County Commissioners Court of Cook County had granted to the incorporators a license to construct a plank road from the City of Chicago to Oak Ridge, and from thence to Wheeling, and to the North line of said County, and giving to the Company all the powers, etc., contained in the fourteen sections of the Act of February 10, 1849, first alleged in the bill, and some additional powers.

NOTE 1: The act referred to is printed in full *post* p. 71. It is complete in twenty sections, as an act incorporating the plank road company, mentioned in the

title; section 20 making it a public act. Sections 21, 22 and 23, alleged in this bill were evidently surreptitiously attached to the bill by fraud, to procure their passage by those who read only the title, and relied on the requirement of the constitution.

The County Commissioners had no authority to license a plankroad company; but a turnpike road company could be licensed to build a road if organized under the general law which limited its duration to *thirty* (30) years or less.

NOTE 2: The courts of a state take judicial cognizance of the geography of the state. (*Peck* v. *Sims*, 120 Ind., p. 348; *Hays* v. *The State*, 8 Ind., p. 426; *Bannister* v. *Ditching Ass.*, 52 Ind., p. 183.) The Circuit Court of a county must necessarily take judicial cognizance of the cities and places within the county, and of the county lines established by law, and this recital began the averment of a claim to a plank road franchise, with the right to exert the powers of eminent domain and collect tolls, over a road *extending from the city to the county line;* 20½ miles in length, of which length the legislature and the courts would naturally take cognizance.

NOTE 3: The decision of the Supreme Court of Illinois, upon this charter of the Northwestern Plank Road Company, so alleged, is found upon page 63 of the record, in these words:

"Unquestionably Sections 21 and 22 of the Act of February 12, 1849, were unconstitutional; and conferred no rights whatever. They provided for the organization of the "Northwestern Plank Road Company," to construct a plank road from the city of Chicago to Oak Ridge and from thence to Wheeling, and to the North line of Cook County;" and were inserted in the body of an Act whose title was: "An Act to construct a plank road from Oswego in Kendall County, to the Indiana line by the way of Joliet, Will County." This was a clear violation of that part of Section 23 of Article 3 of the Constitution of 1848; which provides, that "No private or local law shall embrace more than one subject, and that shall be expressed in the title."

Rec. 56. By leave of court, plaintiffs, in January, 1890, *amended their Bill*, by inserting at this point, an averment that after the passage of the Act of February 12, 1849, (containing those void sections), and *prior to March 1, 1854*, and in pursuance of those void sections of said Act of February 12, 1849, said Gray, Filkins and Richmond named in said (void) 21st Section of said Act of February 12, 1849, organized said Northwestern Plank Road Company in due form of law, and pursuant to the right and power by said enactment conferred on them. And that said corporators and said Northwestern Plank Road Company so as aforesaid incorporated and organized (under said void Sections 21, 22 and 23 of said Act of 1849) afterwards and *prior to March 1, 1854*, (having theretofore been granted by the County Commissioners' Court of Cook County, a license to construct a plank road from the City of Chicago to Oak Ridge and from thence to Wheeling, and the North line of said County, as in said enactment declared and stated as aforesaid,) did proceed to prosecute the construction of said plank road under the powers given and referred to in said enactments. That said Northwestern Plank Road Company under said enactment (of February 12, 1849) had and was given the right to take and use any public highway along the line of said contemplated plank road, upon obtaining the order of the County Commissioners Court of said County to be entered of record, consenting to the appropriation of such road or highway. That said Northwestern Plank Road Company, and said incorporators thereof, (after said Act of February 12, 1849) and by virtue thereof, and prior to March 1, 1854, did obtain the order of the County Commissioners' Court of Cook County, which was duly entered of record, consenting to the appropriation by said Company of what was then known as the Milwaukee road, now known as Milwaukee Avenue, from the intersection of North Avenue, which was then the North limit of Chicago, to a point on said road or avenue six miles or thereabouts Northwest from said intersection.

That by virtue of the premises, and pursuant to said order of said County Commissioners' Court, the said Northwestern Plank Road Company, and the said incorporators thereof, thereupon, and *prior to March 1st, 1854*,

did take and use, for the purpose of constructing said plank road as in said enactment of 1849 contemplated, the said Milwaukee Road or highway, from said City of Chicago extending thence six miles, or thereabouts, Northwest.

That by virtue of the premises and the subsequent act of the Legislature of Illinois, hereinafter next mentioned, which was approved March 1, 1854, whereby said acts and doings of said incorporators were legalized and made valid, the right to use said highway so as aforesaid taken, appropriated and used for the purposes of said plank road, did vest in said Northwestern Plank Road Company as fully and completely *as though said corporation had obtained the same by grant.*

NOTE: It will be seen that this is *an admission that the corporation did not obtain* its right to use the highway *by grant*, but got the color of right by fraud, and did all its improvements under three sections which were stolen through the legislature at the back end of a bill for another purpose, having a title expressing that purpose, and so complete that its last words made it a public act, after which these three irrelevant sections were in some manner surreptiously attached.

Rec. 8. *The Bill* proceeds: "Your orators further represent that by a subsequent Act of the Legislature of Illinois, approved March 1, 1854, entitled 'An Act to Incorporate the Northwestern Plank Road Company,' the said Northwestern Plank Road Company was duly incorporated and chartered"; and the bill then proceeds to give that Act in three sections in haec verba.

The first section enacts that three persons named and their associates, to whom was granted by the County Commissioners Court of Cook County a license to construct a plank road from the city of Chicago to Oak Ridge, and from thence to Wheeling and to the North line of said County, be and they are constituted a corporation under the name of the Northwestern Plank Road Company, by that name to have perpetual succession and the right to sue and be sued, together with all other rights and ordinary powers of a corporate body.

Section 2 purported to give to that corporation all the powers, etc., contained in the 14 sections of the Act of February 10, 1849, first copied in the bill, with some additions. Those sections provided for power to erect and maintain toll houses and toll gates, and collect tolls; and also for power to acquire land for the road by the power of eminent domain, by condemnation in the manner specified.

Section 3 is in these words: "That whereas, the corporators heretofore named did organize and proceed to prosecute the construction of such road under the powers referred to, all the acts of said corporators done in accordance with the rights and provisions therein contained, in good faith, are hereby legalized and made valid, the same as if no defect in the title to the original Act had existed.

NOTE 1. It is to be remembered that the amendment to the bill above mentioned *proves that the road was constructed unlawfully*, before any act of incorporation was passed; *and therefore was not constructed under any contract with the State of Illinois.*

NOTE 2. *The Supreme Court of Illinois holds that this Section 3 was unconstitutional and void.* (Rec., 63.)

Rec. 63. The Supreme Court of Illinois further holds that Sections 1 and 2 of this act were valid, but the court says:—

"These sections are prospective and not retrospective in their character. The rights and powers conferred by them are to be exercised in the future. It appears, however, from the allegations in the bill that *the corporators completed their organization under the license granted by the county commissioners of Cook county*, and obtained from that court the order consenting to the appropriation of the highway known as Milwaukee Road, and afterwards called Milwaukee Avenue, before the passage of the Act of March 1, 1854; *also, that the company took and used such highway for the construction of the road before March 1, 1854.* The bill does not aver that any of these acts were done, or that any of these proceedings were taken after the passage of the Act of 1854, but proceeds upon the theory that they were legalized by the 3rd section of that act. *Owing to the void character of said Section 3, they were not so legalized.*"

The Supreme Court of Illinois being right, in its view as to the averments, of the bill, as to the time when these

acts were done, they were not under any contract, or as consideration for any contract, and *the main assumption of plaintiffs in error to sustain their claim under the federal question, is eliminated from their bill.*

NOTE. 3. Section 66 attached to the brief of Counsel for Plaintiffs in error was passed in 1859, four years after the act of 1854; and at and prior to 1854 the county Commissioners Court had no power to authorize any but a *turnpike* road company organized under Ch. 42 of the Revised Statutes of 1845 to take possession or charge of any road; and the franchise of such company must be for not more than 30 years.

At the foot of page 9 of the record *the Bill* proceeds to allege that the Northwestern Plank Road Company became incorporated and proceeded to prosecute and complete the construction of such road under the powers and franchise which were *as aforesaid* conferred on said Northwestern Plank Road Company. That the plank road of said Northwestern Plank Road Company so *as aforesaid* by it constructed and completed, included the plank road with the liberties, privileges and franchises thereunto belonging and appertaining, which thereafter was purchased by said Amos J. Snell as hereinafter fully stated.

NOTE. These averments are, not that the road was prosecuted, built or completed under the Act of 1854, but that it was done under the powers and franchises which were *as aforesaid* conferred on said company, and that the plank road was *so as aforesaid* by it constructed and completed; the word aforesaid referring to the license of the county commissioners' court, and a time prior to March 1, 1854, and to the void act of 1849, under which the Act of 1854 recited that the corporators had constructed the road.

On page 10 of the record, *the Bill* proceeds to narrow the averment, and, instead of alleging or letting it appear that the whole road was constructed, it alleged that the

corporation built and operated the toll road with toll houses from North Avenue, which was then the northern limit of the City of Chicago, northwesterly *to the Village of Jefferson*, a point on said Milwaukee Avenue six miles Northwest from said city limits of Chicago, and continued to maintain such toll houses and gates, and to collect and receive tolls on that six miles until the purchase thereof by said Amos J. Snell, as herein stated.

The Bill proceeds, on page 11, to allege in haec verba an Act of the Legislature of Illinois, approved February 15, 1865, entitled "An Act to amend the Charter of the Northwestern Plank Road Company, in the County of Cook, and to authorize the sale of the franchise."

Section 1 (of this Act of 1865), provided that the Northwestern Plank Road Company be authorized to substitute stone or gravel in place of plank upon said road or any part thereof, provided the same shall be of equal width with the plank track, and be constructed so as to pass the examination of the inspectors of plank roads in said county; and Section 2 was, that said Company *may collect the same tolls and enjoy the same privileges granted to plank road companies by the general plank road law.* And it may collect the same penalties, fines and damages for any violation of its rights, or damage to its property, that is authorized by said general law, and be subject to the same penalties that law imposes for the abuse of travelers, or the community.

The bill alleges at the foot of page 11, that the corporation duly accepted this amendment of its charter.

NOTE 1. It is to be remembered that Section 2 of the charter, recited on page 9 of the record, did not detail the privileges of this corporation, but said that it should have the privileges contained in fourteen sections of another act, which were referred to by their numbers, and this act of 1865, changed the reference authorizing the company to use a different material for the road, and bringing it under the inspection of the general law; it also changed the reference to the law conferring the power to collect tolls and granting privileges,

referring those points to the general plank road law, and giving the corporation the benefit of the provisions of that law, as to all privileges granted to plank road companies, and as to the penalties and protection granted by that general law. This amendment of the charter did not give to the corporation power to select from both acts such privileges as it would, but substituted the general law for that contained in the reference found in the Act of 1854. (*Norris* v. *Crocker* 13 How, p. 438, U. S., Tynen 11 Wal. 92; *Pana* v. *Bowler*, 107 U. S., p. 538.)

The interpretation of private charters is most strongly against the corporation, and most favorably to the state and to the public. (Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S., 659.)

The interpretation of a state statute is ordinarily with the courts of the states which enacted the statute.

Rec. 63. The Supreme Court of Illinois says that this act of 1865 recognized the existence of the corporation. It also says, Rec., 70:

"The Act of 1865 evidently intended to put the Northweste n Plank Road Company upon the same footing with plank roads organized under the general law of the state."

The bill does not state that there was any act done, by the corporation in the construction or repair of the road between the passage of the Act of 1854 and the privilege of substituting of stone or gravel for plank under the act of 1865, or at any time prior to the sale to Snell; and de non apparet non est,—on the face of the bill, the corporation did nothing but collect toll after the Act of 1854 until it accepted the amendment allowing it to substitute gravel under the act of 1865, when having obtained all of the benefit of the general plank and gravel road laws, it was subject to all the provisions of those laws.

The Bill further upon page 11 avers, haec verba, Sections 3, 4 and 5 of this Act of 1865, which provided that the corporation might sell, *to the County of Cook*, the

franchises, and property and immunities of said Company, or to any other party or parties, and thus dissolve said Company and divide the avails among the stockholders. Section 4 authorized the Board of Supervisors of Cook County to purchase the franchise, property and immunties, and added, *should said County fail to purchase* the same, any person or persons may purchase the same and thereby make the same private property.

Section 5 provided that the deed of the company to said County of Cook, or to any other party purchasing, shall be a good and lawful title to the same; providing that the purchaser or purchasers of said franchise and road shall be bound by all the obligations said Northwestern Plank Road Company is by its charter, and shall enjoy all the rights and privileges enjoyed by said company, and no more.

NOTE. By this act no difference was made between the rights which should be granted to the County of Cook or to any other purchaser under such purchase. If the County of Cook bought what was sold, it would become public property; if any other person bought it, it would become private property; but in either event the rights and privileges and property enjoyed by the private person would be the same as those enjoyed by the County of Cook, and to be exercised by it, and no other. If the right to establish toll gates and collect tolls would pass by the mere operation of giving a deed to a private person, so that he could of his own will and right erect toll gates and impose and collect tolls, the County of Cook could do the same thing if it was purchaser. If other legislation would be necessary to permit Cook County to build toll gates and collect tolls, other legislation would be necessary to permit a private purchaser to build toll gates and collect tolls; for the private person could not buy any franchise or property rights but such as the county had had an opportunity to buy, and had failed to purchase.

Again, the County of Cook was to have the option to purchase the whole and make it public property, after the corporation had elected to act upon the privilege given it by the Legislature, and no private person could

be permitted to make the purchase until the County had been offered the opportunity and had failed to make the purchase. And here the statute is to be construed under the general law and policy of the State, stated by the Supreme Court of Illinois on page 72 of the record, namely: to give the control of streets to the cities and towns through which they pass.

The Supreme Court of Illinois comments upon this Section, upon page 65 of the record, holding, that *the county could not, under the averments of the bill, be held to have failed to purchase, and that such action of the County, such failure to purchase, was a necessary prerequisite to the right of the corporation to sell to any private person.*

Thus, in exercise of the mere ordinary function of a state court in construing contracts made within the state, the Supreme Court of Illinois *destroyed the claim of these plaintiffs in error*, holding that the Legislature did not intend to and did not confer authority on the corporation to sell to Snell, or on Snell to purchase, until after the county had had the opportunity to buy and make the whole public property, and had failed to do it.

The Bill proceeds at the foot of page 11 to aver that said corporation duly accepted said amendment of its charter, and became possessed of the additional privileges contained in that act of 1865.

By amendment (Rec., 55), it added: "that the said County of Cook did not purchase the franchise in this property and immunities of said company."

The Bill proceeds, on page 12, to aver that Amos J. Snell on August 5, 1870, did purchase from said corporation all of its rights and title in and to the road and franchises and property of the Company for $20,000, and that the corporation pursuant to such sale executed and delivered to said Amos J. Snell a deed, which is given in haec verba.

Note: The bill does not say that the county failed to purchase; and as it reads at this point, it is a distinct averment that the corporation sold to Snell without having offered the purchase to the County.

Rec. 12. The deed alleged in *the Bill* in haec verba began with recitals as follows:

Whereas, the Northwestern Plank Road Company was made a corporation by an Act of the Legislature of Illinois entitled "An Act to incorporate the Northwestern Plank Road Company"; approved March 1, 1854;

And whereas, "An Act to amend the charter of the Northwestern Plank Road Company, in the County of Cook, and to authorize the sale of the franchise," was passed by the Legislature of Illinois, approved February 15, 1865, containing the following: (Then follow quotations from Sections 3 and 5:)

And whereas, at a meeting of the stockholders held on January 5, 1866, the following resolution was passed: Resolved by the stockholders of this Company, that Thomas Richmond, President, be authorized to sell the plank road. toll houses and other property belonging to the Company, with the franchise and all its rights and privileges, and give a deed of the same to the purchaser, for such sum and upon such conditions as he shall deem advisable;

Therefore conveys to Amos J. Snell, his heirs, executors, administrators and assigns, all the property of said Company, consisting of the charter and its amendments and franchises, the right of way, the grading, the planking, ditches, bridges and drainages, the toll houses, gates, teams implements of work, and *being the plank road from the old city limits of Chicago aforesaid to the nine-mile post*, together with all the property, goods and chattels of said Company, of whatsoever nature or description: to have and to hold, unto the said Amos J. Snell, his heirs, executors, administrators and assigns forever.

NOTE 1: Rec., 69. The Supreme Court of Illinois holds that "it is manifest that Snell only bought a part of the plank road, nine miles in length, and the franchise of using the same and collecting the tolls thereon;" and that a deed of part of the road, and the franchise as to that part, was void.

It is hard to escape the conclusion to which the Supreme Court of Illinois came. The deed is a quitclaim

deed (in effect) of property mentioned in general terms, but concluding with the words of express description, particularly defining the property and franchise conveyed —"being the plank road from the old city limits of Chicago to the nine mile post."

The Supreme Court of Illinois asks: "What became of the balance of the road? Was it abandoned or was it sold to some other purchaser"?—— The bill gives no answer to these questions. The bill makes no claim or averment that Snell bought one inch more than that six miles. So far as its averments go, construed according to the rule applicable to such pleadings, it disclaims and (in effect) denies that Snell purchased any more than that six miles.

If the deed was ambiguous, proof that the grantor delivered, and the grantee received, only the six miles, would be proof of contemporaneous construction by the parties, and would remove the ambiguity. Proof that a heavy burden of duty attached to the other fourteen miles of road which Snell did not wish to assume and refused to assume, would have tended to remove such ambiguity, and apply the deed to its subject.

Proof that the same moment that deed was given to Snell, and as part of the same transaction another deed was delivered conveying all the balance of the road to another (perhaps a straw man wholly irresponsible), would prove that there was no ambiguity.

Any of these facts were consistent with the contents of the deed; many other conditions of fact would have been consistent with it; and as the bill must be taken most strongly against the pleader, the court must presume that some such fact existed which prevented the Corporation from making *an unqualified* deed of all the plank road from the old city limits to Oak Ridge, and from there to Wheeling, and to the north line of the county, and all franchises concerning it.

As pleaded for the purpose of asserting any such rights as are asserted in this bill, *that deed is not shown to be valid*, and hence must be considered *void* under the rule of pleading; it may be and appears to be a deed of part only, and the presumption or possibility is not negatived by any averment.

Further, *there is no averment that the corporation passed the resolution* supposed in the deed. The recital of such matter in the deed is not an averment of the pleading that such a resolution was passed. Hence the case stands that *the corporation did not resolve to sell, or dissolve.* Things not averred are as things that are not, in a case submitted on demurrer.

NOTE 2: Rec. 67. The Supreme Court of Illinois holds that what was authorized by the statute of 1865 to be sold was not an inheritable property that could pass to the heirs of the purchaser and become a perpetuity in that person and his heirs, by a sort of entail, and that the statute did not authorize the insertion of the words his heirs, executors, administrators and assigns; but that the insertion of those words in the deed was unauthorized and void.

We shall take occasion to refer to the condition that would have arisen if a toll road charter had been permitted to be conveyed to a private person, to descend to and be divided among infant heirs from generation to generation, where the obligation to keep up the road could not be complied with by a large number of infants, and could not be enforced by the penalties of the law, or by the collection of damages at the suit of any person injured by dilapidations or holes in the road—or whose property might be injured by them. At this point it is sufficient to note that the Supreme Court of Illinois held that the franchise was not descendable or inheritable, and that the laws of descent or inheritance are artificial enactments of each state; that the failure to pass such laws, or to give to any particular descendant or number of descendants a right of property in a franchise, or chose in action that belonged to an ancestor, could not raise a federal question.

The laws of the State in which such property is situate *control exclusively its descent*, devise, alienation and transfer, and *the effect and construction of instruments* intended to convey it. (U. S. v. Fox, 94 U. S., 315; Watts v. Waddle, 6 Pet., 389, p. 400–1; U. S. v. Crosby, 7 Cranch, 115; Clark v. Graham, 6 Wheat., 577; Kerr v.

Moon, 9 Wheat., 565, p. 571; McCormick v. Sullivant, 10 Wheat., 192, p. 302; Watkins v. Holman, 16 Pet., 25, p. 57; Oakley v. Bennett, 11 How., 33, p. 45; Suydam v. Williamson, 24 How., 427; McGoon v. Scales, 9 Wal., 23, p. 32; Brine v. Hartford Fire Ins. Co., 96 U. S., 627; A. & F. C. U. v. Yount, 101 U. S., 352; Jones v. Habersham, 107 U. S., 174.)

No title to such property *can be acquired or passed*, unless according to the laws of the State where it is situate. (Clark v. Graham, 6 Wheaton, 577.)

All contracts between private parties are made with reference to the law of the place where they are made or are to be performed. Their *construction*, validity and effect, are governed by the place where they are made, and are to be performed. (Brine v. Hartford F. Ins. Co., 96 U. S., 627.)

In some states, statutes have been passed, saving to executors or administrators claims to damages for personal injury, which at common law die with the party suffering them; in other states statutes save such rights of action to the widow or children of the party, and it would be as sensible to say that in states where no such statutes have been passed, a federal question is raised, and this Court could reverse the judgment of the State Court denying that such rights of action had survived, as to claim that a federal question arises because the State of Illinois did not, in authorizing the sale of this toll road franchise, provide that it should survive to the heirs, executors, administrators and assigns of the purchaser forever, or to the widow, or the eldest son, or to somebody else, and by some rule, to some line of persons, forever.

Rec. 14. *The Bill*, after stating two conclusions of law which it claimed, proceeds to aver that said *Amos J. Snell* in his lifetime, and prior to the extension of the city limits of Chicago, as they were afterwards extended, to take in the locus in quo, *erected the toll-house*, which the defendants (the City, etc.) have designated as "the toll office of Mr. Snell, located on the Southeast corner of Milwaukee Avenue and Fullerton Avenue," and also as

"the toll gate building on Milwaukee Avenue South of Fullerton Avenue," and that "said Amos J. Snell, from and after the erection of said gate and building, as aforesaid, for and during the period up to his death, operated and maintained said toll gate and toll house for the accommodation and management of said toll road," "which erection, maintaining and operating of said gate and toll house was deemed by said Amos J. Snell suitable to his interest, in the management of said road." Rec. 15. "That without said gate and toll-house large sums of money would have been lost to said Snell; that in order to secure tolls for the use of said road, *he, said Amos J. Snell, erected, maintained and operated the said toll gate* and toll-house at the said intersection of said toll road with said Fullerton Avenue as aforesaid; that for the purpose of a more definite understanding of the location of said toll gate and toll house, or toll office, your orators attach hereto, as part of this bill, a plat or map, on which is indicated the location of the same."

The map referred to is opposite page 22 of the record; and the toll house referred to is marked on that map with the words "toll-house in question."

The map shows that Fullerton Avenue runs from West to East, the West end being at the left of the map. Thomas Avenue, Burchell and Clifton Streets, at right angles to Fullerton Avenue, run North.

NOTE: The bill is confined to a matter concerning that particular toll gate, located and built by Mr. Snell after August 5, 1870, and before his death.

Rec. 68–9. The Supreme Court of Illinois holds that Mr. Snell had no power or authority to locate a building or gate there at that point; that it was an unlawful erection; that one of the obligations of the Company was to refrain from building any obstruction at that point.

Rec. 15. The bill proceeds: "That ever since the death of said Amos J. Snell as stated hereinafter, the complainants, as the legal and personal representatives of said Amos J. Snell, have maintained and operated, and

still maintain and operate the said toll gate and toll house, for the purpose of collecting tolls thereat, and if the threat and purpose of the defendants, as hereinafter stated, to remove said toll gate and toll house or toll gate building, as the defendants designate the same, shall be carried out, as orators believe they intend to and will do, unless forbidden by the injunction of this Court, will cause orators to be subjected to great loss and irreparable injury; and they will be subjected to a multiplicity of suits against all such persons as should thereby be enabled to, and who would travel upon and over that portion of said toll road lying between Fullerton Avenue and the Easterly terminus of said toll road, at the intersection of said Milwaukee Avenue and North Avenue, now within the present limits of said city of Chicago, without being compelled to pay to the complainants the usual tolls therefor on account of such removal of said toll gate and toll house if the defendants are not prohibited by injunction, from carrying out their said threat and purpose, and they would also be subjected to the necessity of instituting a multiplicity of suits against the defendants herein for causing loss to the complainants of such tolls as the complainants would be entitled to collect, and which the complainants could not otherwise collect by reason of such wrongful removal of said toll-gate and toll house or toll gate building, by the defendants.

"Orators further say that on February 8th, 1888, said Amos J. Snell, being then a resident of said City of Chicago, in said County of Cook, and a citizen of the State of Illinois, died intestate, leaving him surviving your orator, Henrietta Snell, as his widow, and orators Albert J. Snell, Grace S. Coffin, Mary Stone and Alice E. McCrea, his only children and only heirs at law, who thereupon, became by the law of this State regulating the descent of intestate estates, the owners of all the property of which said Amos J. Snell died seized and possessed, including said toll road, toll gates and toll houses, and the property and franchise so as aforesaid purchased by said Amos J. Snell, and conveyed to him by said deed. That on February 16, 1888, orators Henrietta Snell and Albert J. Stone, administrators, were duly appointed administrators

of the estate of said intestate, and are now the duly qualified and acting administrators of said estate."

NOTE. The bill, up to this point, only contained the averments of the plaintiffs' title to property and a franchise, and forshadowed that the only property so threatened was the particular toll house marked on the map with the words, "Toll house in question."

The Bill at this point proceeds, as the pleader had the right to do, to state the plaintiffs' claims as matters of law arising out of the premised charters and facts; which matters or claims of the law are not admitted by the demurrer.

Rec. 16. The Bill claims that under said charter the Plank Road Company had the right to erect and maintain such toll gates and other buildings as it should deem suitable to its interest; and that such rights were vested many years before the city of Chicago acquired any jurisdiction over any of the territory through which the toll road passes, and that such vested rights passed to Amos J. Snell (after one extension of the city limits) while the territory traversed by said toll road lying West of *Western Avenue* was not embraced within the territorial limits of the City of Chicago; and orators claim that *the erection and operation* of the toll gate building (in question), on Milwaukee Avenue South of Fullerton Avenue *by said Amos J. Snell, and by the complainants since his death*, have been the exercise of the rights conferred on them by virtue of the premises; and the same are not now and never have been subject to any control by, or interference on the part of, the said City of Chicago, or any of its officers, agents or servants; and they further claim that the threatened removal of said toll gate and toll house (designated by the defendants as the toll gate building) is usurpation, and in direct violation and disregard of the said vested rights, so acquired by the said corporation: and which became vested in the said Amos J. Snell; and belong to and are vested in orators as his legal and personal representatives. That extension of the corporate limits of the the city of Chicago to embrace and include

the territory where that gate is, and the extension of municipal authority over such extended limits, has not, would not, and cannot abridge, affect or impair any right which said Plank Road Company acquired, and which passed to said Amos J. Snell under his purchase and deed, and to your orators as his legal and personal representatives; and has not conferred upon said city, or its officers, the right or power to remove the said gate and toll house, or any toll gate, toll house or other building which had been so as aforesaid erected, operated and maintained, for the accommodation and management of said toll road and the travel and transport thereon prior to any extension of the limits of said City to include the same.

The Bill now, having stated the alleged rights of plaintiff, proceeds to state the threatened injury.

Rec. 17. Orators show that at a meeting of the City Council of said City on December 10, 1888, the following petition of nine citizens and tax payers of the said City of Chicago was presented:

CHICAGO, Nov. 28th, 1888.

To the honorable mayor and common council of the city of Chicago.

GENTLEMEN: The undersigned citizens and property owners of this vicinity, most respectfully request your honorable body *to have an apron placed across the ditch* on the Southeast corner of Milwaukee Avenue and Fullerton Avenue. In order to do this *it will be necessary to remove a small office owned and occupied by Mr. Snell as a toll office.* By granting this request you will greatly oblige a large number of citizens and tax payers.

(Signed by nine persons of the immediate vicinity. Rec., 22.)

That the City Council upon said petition passed an order that the Commissioner of Public Works of said City be and he was thereby directed to remove said toll office, (Rec. 18;) the record of the Council proceedings in this matter being as follows:

Rec. 44. Alderman Doornbos presented a petition, and an order for the removal of the toll office of Mr. Snell, located on the south-east corner of Milwaukee avenue and Fullerton avenue, and moved the passage of the order.

The motion prevailed.

The following is the order as passed:

Ordered that the Commissioner of Public Works be, and he is hereby directed to remove said office *in accordance with the petition hereto attached.*

Rec. 18. The bill proceeds to state, that afterwards on December 15, 1888, George B. Swift, Commissioner of Public Works of said city, caused to be served on complainants severally notices in the words and figures following:

Notice to remove Obstructions.

OFFICE OF THE DEPARTMENT OF PUBLIC WORKS.

CHICAGO, Dec. 15, 1888.

To (name of person served):

You are hereby required to remove the toll gate building on Milwaukee Avenue, South of Fullerton Avenue, within the space of five (5) days from the date hereof, and this you will in no wise omit, under penalty.

In violation of Section 1,996 of the municipal code of the city of Chicago.

GEORGE B. SWIFT,
Commissioner of the Department of Public Works.

A. N. LANGE,
Special Policeman.

Rec. 19. Which notices were for the notification of complainants of the purpose and intention of said City of Chicago, and the said George B. Swift, Commissioner of the Department of Public Works of said City, to remove, or cause to be removed, from the said place where the same is and has been for many years used as aforesaid, the said toll gate building mentioned in said notice, the same being the said toll gate and toll house at the intersection of said Milwaukee Avenue and Fullerton Avenue; it being claimed by said Commissioner that said toll gate building on Milwaukee Avenue South of Fullerton Avenue, erected, maintained and operated as aforesaid, is in violation of Section 1,996 of the Municipal Code of the City of Chicago, which Section is as follows:

"1996. The owner of any building, fence, porch, "steps, gallery, or other obstruction now standing, or "which may hereafter be erected or placed upon any "street, alley or sidewalk or public ground, within this "City, or which may be left standing upon any new street "that has been or may hereafter be opened, shall remove "the same within such reasonable time, not exceeding "thirty nor less than three days, as he shall be required "so to do by a notice signed by the Commissioner "of Public Works, under a penalty of not less than "twenty-five dollars nor more than one hundred dollars, "and a further penalty of ten dollars for every day the "same shall so remain."

The bill charges that the City of Chicago and its Commissioner of Public Works threaten and intend to remove said toll gate building, and that they will speedily do so unless restrained by injunction of this court from so doing; and that such removal would work great and irreparable damage to orators, subjecting them to the necessity of instituting a multiplicity of suits at law for the enforcement of their rights in the premises.

Rec. 19. The bill proceeds to state that said Plank Road Company, till Snell's purchase, and Amos J. Snell from his purchase till his death, and plaintiffs as his legal and personal representatives from thence hitherto have collected and continue to collect tolls for the travel and transport of all such persons as passed to and fro over and along said toll road, including that portion thereof which traverses territory now lying within the corporate limits of Chicago, and orators charge that all extensions of the corporate limits of said city to include territory covered by said toll road, were made subsequent to the conferring of the right to collect tolls thereon as aforesaid, under and by virtue of said enactment, and that no subsequent extension of the corporate limits of said City could in any manner or to any extent abridge, affect or impair the then existing right of the owners or owner of said toll road, and of the franchise belonging or pertaining thereto, to the free and undisturbed collection of such tolls, or the maintaining and operating of said toll gates, toll houses and other buildings as aforesaid, for the ac-

commodation and management of said toll road, including said toll gate building, which the defendants so as aforesaid wrongfully threaten to remove as aforesaid.

The next paragraph alleges injuries and losses to flow from the removal of said toll gate and building.

The next paragraph is the jurisdiction clause, and prayer for subpœna to answer, and for temporary injunction pending suit, and perpetual injunction and decree, forbidding the city and its officers to remove or attempt to remove said toll gate and toll house, and from in any manner interfering or attempting to interfere with the use thereof for the collection of tolls thereat by the complainants as aforesaid, and also for such other and further relief as may be meet.

The case really originated, and the immediate concern of the bill was about that little 4x6 toll house, *which the city ordered to be removed far enough to enable it to plank over a dangerous or offensive ditch.*

MATTERS OF FACT OBSERVED, AND MATTERS OF LAW DECIDED, BY THE SUPREME COURT OF ILLINOIS.

Such matters have been in part, above, noticed in connection with different parts of the bill, but they have not all been mentioned, and it will aid the inquiry here to state them.

The Supreme court of Illinois has observed as a fact, or decided as law upon this record, that

1. In Illinois the roads and public highways belong to the original land owners and their grantees or successors, subject only to the easement of the public. (Rec. 64.)

NOTE: This easement is a right of passage over the land, and to construct such roadway as may be necessary or convenient for the passage of the citizens of the state and their vehicles and cattle. That the fee, including all fixtures and improvements put upon the land, as well as the land itself to the center of the earth and out into space, belong to the private land owner, subject only to the public right of passage and those rights necessary to the exercise of that right of passage to the best advantage of the people.

2. The three sections 21, 22 and 23, purporting to be a private act of incorporation of the Northwestern Plank Road Company, pinned onto, or otherwise surreptitiously attached to an act entitled "An Act to construct a plank road from Oswego in Kendall County to the Indiana line by way of Joliet, Will County", (which was a complete charter of the corporation named in its title, and was by section 20, its last section, made a public act,) were null and void, and did not grant anything to the persons named in said three fraudulent sections; (Rec. 63;) (any more than a will, procured by a designing person to be signed, without knowledge of its contents by the testator, would convey, if not witnessed or otherwise authenticated in the manner required by law for such instruments.)

That all that was alleged by the bill to be done by the Northwestern Plank Road Company, pursuant to any

charter or supposed charter, was done upon the Milwaukee road, which was and had been a public highway, and that it was done prior to March 1, 1854. (Rec., 63.)

NOTE: The building of the plank road and toll gates and other fixtures upon that Milwaukee road was done by trespassers upon the land, without any authority from or contract with the State, and all things that they put upon that road which were in any manner attached to the land, became the private property of the persons who owned the fee, and were their private property on the first day of March, 1854, the day when the Northwestern Plank Road Company was in fact incorporated. In other words, whatever improvements were attached to the road prior to the actual incorporation of the company in 1854, could not form a consideration for the pretended contract with the state arising from the charter of 1854.

3. That while the first and second sections of the act of March 1st, 1854, incorporating said Northwestern Plank Road Company, were valid, their operation was not retrospective, but prospective only, granting powers to do certain things in the future; and section 3, purporting to legalize acts done prior to that time and give the corporation retrospective powers, was void under the explicit provisions of the Constitution and the unbroken line of decisions of the State. (Rec., 63.)

NOTE: Therefore, all the plank road, toll gates and toll houses and other erections alleged by the bill to have been theretofore placed on the Milwaukee road, were the property of the owners of the fee of the land at the date of that charter, and the corporation had no property rights in them whatsoever; the corporation did not, after the passage of the charter, at any time, do any act of value upon or contribute any value to that Milwaukee road, which might form a consideration for a contract. No such matter was averred, and therefore none such exists.

4. That the act of February 15, 1865, entitled "An Act to amend the charter of the Northwestern Plank Road Company in the County of Cook, and to authorize the sale of the franchise," was a valid act.

NOTE: The last named act of 1865 did not operate ipso facto as an amendment of the charter of that private corporation, but required acceptance by the corporation before it operated upon and bound the corporation to its terms. *Morawetz on Corp.*, Sec. 14, 15.

5. That the effect of that act, when accepted, was to bring the corporation under the general plank road laws of the State, and to give to the corporation the protection provided by the penalties and the general administration of justice which should be from time to time found in the general laws upon those subjects. (Rec., 70.)

6. This act is to be construed most strongly against the private corporation, and makes it amenable to all public and general laws, whose benefits it had invoked.

NOTE: This is proper and just, this act being procured by the corporation from the State for its own benefit, and to give it all the advantages of the general laws.

7. That it was the design of the act of 1865 to give the county the right in the first place to obtain a surrender to itself of the privileges granted to the company; that the failure of the county to purchase was a necessary prerequisite to the right of the corporation to sell.

NOTE: The sections providing for the sale of the franchise being read together, in view of the policy of the state as to its highways, and in view of the principle that such laws are to be construed most favorably to the public and against the private corporation, gave to the corporation power to sell to private persons, *only* after the corporation had adopted the amendment to the statute, had notified the County of Cook of its adoption, and had offered to sell the franchise to the County at a price named, or at such price as should be fixed by competent authority, and the County having thus had a full and fair opportunity, had failed to make the purchase; and that the sale to Snell, surreptitiously, and without affording the County of Cook the opportunity to purchase at the price paid by Snell, was not authorized by the act, and Amos J. Snell acquired no title.

8. The attempt to divide the road and franchise and sell in parts was not allowed under the statute of 1865, and the deed to Snell of a part of the road and franchise was void.

9. That Snell did not organize as a corporation under the option and right which a valid sale of the franchise of the Northwestern Plank Road Company under the act of 1865 (that corporation having been dissolved) might have given him; and that franchise, and right to organize such corporation, ceased to exist and became void under the provisions of the Constitution of Illinois, which went into force August 8th, 1870, when the time limited in such Constitution, for such organization, elapsed.

NOTE: Statutes of Limitation do not impair the obligation of contracts; and are not statutes depriving any person of property without due process of law.

10. The privilege of organizing a corporation having been extinguished by the constitution of 1870, and there being no inheritable character to that franchise, as such, under the laws of Illinois, no rights passed either to the widow or the children or the administrators of the estate of Amos J. Snell.

NOTE: There is no obligation on the part of the state to provide laws for descent, so that any person can claim a right of property in a franchise in default of such laws; and ordinarily where a person holding a franchise dies, it falls in and ceases to exist; even property, for which there is no heir provided under the laws of a state, becomes the property of the state.

11. That under the strict construction which must be applied to the act of 1865, the rights and privileges enjoyed by said company could only be enjoyed by the purchaser of the franchise, but not by his heirs or assigns. Any other construction would necessitate the interpolation of the words, "and his heirs and assigns," into the act.

12. The legislature had no power in 1849 or 1854 or 1865 to pass a special charter, which could be so used or applied under a given state of facts as to violate the fundamental law of the state. The state could not be bound by a contract whose enforcement, under new conditions, would be forbidden by the constitution.

The Plank Road Company and its vendee must be held to have accepted the charter granted to them upon the condition, and under the understanding that the right to use the highway for a toll-road should give way as to such part thereof as should become subjected by the growth of the state and its increase in population to the control and government of an incorporated city.

The Supreme Court of Illinois thus decided, that *the plaintiffs in the bill below had no right to maintain a suit concerning the subject matter.*

UPON THE MERITS.

The brief of counsel for plaintiffs in error will aid but little, if at all, in ascertaining what was before the court below.

The question raised, was, *whether the General Assembly entered into a contract with a corporation or individual, by which it divested the state of legislative authority, and, for the state, abdicated essential municipal powers; creating an imperium in imperio; creating a body within the state; above, outside of, superior to the laws;* but the facts on which the question was raised are very narrow, and are not stated in the brief for plaintiffs in error.

The learned counsel, in their brief, in the Supreme Court of Illinois, said: "Except when restrained by express constitutional limitations, the general assembly is "omnipotent as the british parliament." This phrase is inaccurate; the rule being, that, in those particulars where the grant of legislative power is general and unqualified, the general assembly is as omnipotent as the parliament of England; *provided, the power is not of such a nature as to be limited by the general character and organization of our government, or by the Constitution of the United States.*

The phrase, first above quoted, however, has been used by appellants to state their claim. They said: "Except "when restrained by *express constitutional limitations*, "the general assembly is as omnipotent as the british "parliament."

Is there any *express constitutional limitation* that prevents section 12 of chapter 138 of the R. S. of Ill. of 1874, from being the law? That section is as follows:

"*No toll-gate shall be erected, or kept, or toll demanded,* "*within the corporate limits of any incorporated city, or* "*within 160 rods of such limits.*"

Appellant's bill, and their map annexed, show that they are transgressing that law, by keeping a toll-gate within the city limits, and by keeping another toll-gate just outside of the city limits; and they have applied to a court of chancery to protect their transgression.

The legislature clearly had power to adopt that law, if

it has a shadow of the *omnipotence* of the british parliament.

We are unable to find any *express constitutional limitation* that annuls the following parts of Sec. 62 of Chapter 24 of the Revised Statutes of Illinois.

"The city council in cities, and president and the board of trustees "in villages, shall have the following powers:

"*Seventh*—To lay out, establish, open, alter, widen, extend, grade, "pave, or otherwise improve streets, alleys, avenues, sidewalks, "wharves, parks and public grounds and vacate the same.

"*Eighth*—To plant trees upon the same.

"*Ninth*—*To regulate the use of the same.*

"*Tenth*—*To prevent and remove encroachments or obstructions upon the "same.*

"*Eleventh*—To provide for the lighting of the same.

"*Twelfth*—To provide for the cleaning of the same.

"*Thirteenth*—To regulate the openings therein for the laying of gas "or water-mains and pipes, and the building and repairing of sewers, "tunnels *and drains*, and erecting gas lights.

"*Fourteenth*—To regulate the use of sidewalks and all structures "thereunder.

"*Fifteenth*—To regulate and prevent the throwing or depositing of "ashes, offal, dirt, garbage, or any offensive matter in, and to prevent "injury to any street, avenue, alley or public ground.

"*Sixteenth*—*To provide for and regulate cross-walks, curbs and gut-"ters.*

"*Seventeenth*—To regulate and prevent the use of streets, sidewalks "and public grounds for signs, sign-posts, awnings, awning-posts, tele-"graph-poles, horse-troughs, racks, posting handbills and advertise-"ments.

Eighteenth—To regulate, etc., carrying banners, etc., on streets.

Nineteenth—To regulate flying signs, etc., across streets.

Twentieth—To regulate traffic on streets, etc.

Twenty-first—To regulate speed of horses, etc.

Twenty-second—To regulate numbering of houses.

Twenty-third—To name and change the names of streets.

"*Twenty-fourth*—To permit, regulate or prohibit the locating, con-"structing or laying a track of any horse railroad in any street, alley "or public place.

"*Twenty-fifth*—To provide for and change the location, grade and "crossings of any railroad.

"*Twenty-eighth*—To construct and keep in repair bridges, viaducts "and tunnels, and to regulate the use thereof.

"*Twenty-ninth*—To construct and keep in repair *culverts, drains,* "sewers and cess-pools, and to regulate the use thereof.

"*Thirtieth*—To deepen, widen, dock, *cover*, wall, alter or change *the "channel of water courses.*

Thirty-first et seq. regard navigable waters.

"*Fifty-seventh*—To regulate the construction repairs and use of "vaults, cisterns, areas, hydrants, pumps, sewers and *gutters.*

"*Sixty-sixth*—To regulate the police of the city or village; *and pass "and enforce all necessary police ordinances.*

"*Seventy-fifth*—*To declare what shall be a nuisance and to abate the "same;* and to impose fines upon parties who may create, continue or "suffer nuisances to exist.

"*Ninety-second*—To prevent and regulate the rolling of hoops, play-
" ing of ball, flying of kites, or any other amusement *or practice having*
" *a tendency to annoy persons passing in the streets* or on the sidewalks.
"*Ninety-sixth*—To pass all ordinances, rules, and make all regula-
" tions proper or necessary to carry into effect the powers granted to
" cities and villages."

Power to levy taxes for all such purposes, as well as power to make local improvements by special assessment or special taxation or general taxation or otherwise, is fully vested in the city by the terms of the same chapter of the Revised Statutes.

Such responsibilities as are imposed on cities have been according to the course of the common law, ever since the decenaries and the hundreds were made responsible for the peace and safety of community within the limits of each in the time of Alfred, and powers like these have been given, at all times, to municipal subdivisions to enable them to discharge the responsibilities imposed on them by the law.

No *express* constitutional limitation seems to obstruct the *omnipotent* power of the legislature to make that the law which is above written. And in so doing it has imposed an onerous duty—enforced by a heavy liability to any one injured by its negligence. " *The city owes to the* " *public the duty to keep the streets in a safe condition for* " *use* in the usual mode by travelers; and is liable, in a " civil action, for special injuries resulting from neglect to " perform this duty." (*Dillon on Municipal Corporations*, Sec. 789.)

The duty is, by the law, imposed upon Chicago.

Browning v. *City of Springfield*, 17 Ill., 147.
Mechanicsburg v. *Meredith*, 54 Ill., 86.
Chicago v. *Power*, 43 Ill., 172.

The bill as to its averments against the city begins upon page 17 of the record, and for concise statement of what is averred against the city, we will slightly rearrange its matter.

The bill avers a petition of nine citizens and taxpayers of the City of Chicago, a copy of which is annexed to the bill, and is in these words:

"Chicago, November 28, 1888.

To the Honorable, the Mayor and Common Council of the City of Chicago,

Gentlemen: The undersigned, citizens and property-owners of this vicinity, most respectfully request your Honorable Body *to have an apron placed across the ditch* on the south-east corner of Milwaukee Avenue and Fullerton Avenue. *In order to do this it will be necessary to remove a small office owned and occupied by Mr. Snell as a toll office.* By granting this request you will greatly oblige a large number of citizens and tax-payers." (Annexed are the names of nine persons, who give the street and number of their respective residences, which almost abut the ditch complained of.)

The bill alleges that upon this petition, by a vote, the City Council adopted the following order on December 10, 1888, at a regular meeting. (Rec., 44.)

"Alderman Doornbos presented a petition and an order for the removal of the toll office of Mr. Snell, located on the south-east corner of Milwaukee Avenue and Fullerton Avenue, and moved the passage of the order.

"The motion prevailed.

"The following is the order as passed:

"Ordered, that the Commissioner of Public Works be and he is hereby directed to remove said office *in accordance with the petition* hereto attached."

The bill alleges that afterwards, and on December 15, 1888, the Commissioner of Public Works of said City caused to be served upon the complainants, Albert J. Snell and Albert J. Stone respectively, a notice in the words and figures following:

"Notice to Remove Obstructions.

Office of the Department of Public Works,
Chicago, Dec. 15, 1888.

To A. J. Snell, Jr., and to A. J. Stone:

You are hereby required to remove the toll gate building on Milwaukee Avenue, south of Fullerton Avenue, within the space of five days from the date hereof, and this you will in nowise omit under penalty. In violation of Section 1996 of the Municipal Code of the City of Chicago.

A. M. Lange, Special Policeman,
George B. Swift, Commissioner of
the Department of Public Works."

The bill further alleges that Section 1,996 of the Municipal Code is as follows:

"The owner of any building, fence, porch, steps, gallery or other obstruction now standing or which may hereafter be erected or placed upon any street, alley or sidewalk or public ground within this city, or which may be left standing upon any new street that has been or may hereafter be opened, shall remove the same within such reasonable time, not exceeding thirty days nor less than three days, as he shall be required so to do by a notice signed by the Commissioner of Public works, under a penalty of not less twenty-five dollars, nor more than one hundred dollars, and the further penalty of ten dollars for every day the same shall so remain."

Annexed to the bill is a plat of the locality showing Fullerton avenue running diagonally, but which in fact runs east and west; showing also north of Fullerton avenue a toll gate, the gate extending over the south side of Milwaukee avenue, and a building covering nearly the whole north half of the avenue. South of Fullerton avenue it shows also a gate, and near the south end of the gate a small block, which is in fact this toll office. It appears to be about where the gutter would be in Milwaukee avenue, and by the map annexed to the bill appears to be about four feet wide by six feet long, being the longest way lengthwise of Milwaukee avenue. How this plat is transcribed into the record, we do not know. The gate on the original plat attached to the bill does not extend to the acute angle formed by Milwaukee avenue and Fullerton avenue, and it is not connected with the little toll office. The little toll offices, upon the printed map, much larger than it appears in the bill; while the toll gate to the north of Fullerton avenue is shown in the

map attached to the bill to be made up of a house covering the north-east half of Milwaukee avenue, and the gate extending across the other part.

The prayer of the bill is, that the defendants, the city of Chicago and the Commissioner of Public Works, and each of them, their officers, agents and servants respectively, may be restrained and prohibited by the injunction of this Honorable Court from removing, or attempting to remove, the said toll gate and toll house, designated as aforesaid in said notice, as a toll gate building on Milwaukee avenue, south of Fullerton avenue, and from in any manner interfering or attempting to interfere with the use thereof, for the collection of tolls thereat by the complainants as aforesaid; and that, upon the hearing in this case, such injunction may be made perpetual; and that your orators may have such other and further relief in the premises as equity may require, and to your Honors shall seem meet.

The only relief that could be had *on that bill* would have been an *injunction forbidding the city to move that little toll office, in conformity with the petition, far enough to allow the city to put an apron or planking over the ditch.* The notice of the commissioner under section 1996 of the Municipal Code and that section raise no right to an injunction.

Upon this bill an injuction was issued, commanding the city of Chicago and the Commissioner of Public Works to "desist and refrain from removing, or attempting to remove the toll gate building on Milwaukee avenue south of Fullerton avenue, and from in any manner interfering or attempting to interfere with the use thereof for the collection of tolls thereat by the said complainants." This injunction was served by the sheriff upon the city and the commissioner of public works.

Motion was made by the city to dissolve that injunction for want of equity on the face of the bill, and that motion coming on to be heard, with the demurrer of the defendants, the court sustained the demurrer, and dismissed the bill for want of equity.

It is apparent that the little petition of the citizens of that vicinity, aroused the plaintiffs in the bill to assert a claim of right that the city cannot put an apron over a dangerous or offensive ditch, if to do so it will be necessary to remove this small toll office.

Their claim is, that the Snells have a right to put their toll gates and toll offices where they please, and the city of Chicago and its officers have not jurisdiction or power to move them for the purpose of putting an apron over a dangerous ditch, or for any other municipal purpose.

The Counsel say in their brief at page 26.

"The charter in express terms conferred upon this "company power to erect and maintain toll houses and "toll gates, *without limit as to number and localities;* such "in *numbers* and *location* as it might deem suitable to its "interests."

The map in the record (p. 22) shows what they mean by the expressions, "without limit as to number and location," and "such in numbers and location as it might deem suitable to its interests." It had a toll house on Milwaukee Avenue on one side of Fullerton Avenue—a house that took up nearly half the highway. Snell built the "toll house in question" on the other side of Fullerton Avenue. The map shows streets and alleys leading into Milwaukee Avenue. Between Fullerton Avenue and North Avenue (which is near the present heart of the city) are a score of streets—the counsel claim that the Snells have a right to put a toll house occupying half the street and a gate reaching across the other half, *on each side* of each street and alley entering Milwaukee Avenue; and thus to obstruct with a hundred toll houses one of the most thronged, important and populous streets, in one of the largest cities of the world, if the Snells deem it suitable to their interests.

As may be seen in one of the above references to Dillon on Municipal Corporations, the city has two characters and two functions. In one respect it is the agent of the state for local state government, as decided in a number of cases, from the 11th Illinois Reports down to

quite recent decisions; and in *New Orleans* v. *N. O. Waterworks Co.*, 142 U. S., 79 p. 91. In its other character the city is a corporation, bound by certain obligations and duties to maintain the highways in good repair and safe for the ordinary passage of persons who wish to go over them, and subject to heavy liabilities and responsibilities to any who may suffer through the negligence of the corporation. The city charter is a law for all the people for the benefit of the whole people.

The scope and object of this bill is to attack the city charter of the city of Chicago, and also the provision of the general law, that no toll gate shall be erected or kept within the corporate limits of any incorporated city, or within 160 rods of such limits.

The bill assails the general law, in effect avers that it is void, *and seeks an injunction to protect the plaintiffs in the transgression of that law.* It also assails the franchise of the city of Chicago, asserts that the general law under which it was incorporated is void as to a certain locality within the corporate limits, and seeks an injunction to prohibit the city from exercising the franchises, and from doing duties that are granted and imposed upon it by the letter of the law.

Such being the scope of the bill, the plaintiffs below set out in the bill a series of pretended statutes; under which they claim that the state has, by contract, abrogated its power to make the laws referred to, or to execute the ordinary police powers, either in its own person or through its municipal divisions.

As we have already seen, the Supreme Court of Illinois, has cut down the list of statutes they assert in their bill, and has left only Sections 1 and 2 of the Act of March 1, 1854, and the whole of the Act of 1865.

Before examining those statutes, it may be profitable to refer to a few of the principles which are to be applied in interpreting or determining the construction of such statutes. And we turn to this first, *because it is vital to maintaining this bill, that the complainants should show, beyond a doubt, that the state has abdicated its power, and that its laws which are above quoted are void, viz:* Sec. 12 of Chap. 138, and Sec. 62 of Chap. 24 of the Revised Statutes of the State.

In *Ruggles* v. *Illinois*, 108 U. S., 528, this court by its chief justice, said:

"In the view we take of this case, the only question that need be considered is, whether the charter of the Central Military Tract Railroad Company * * * purports on its face to grant to the company the right to fix the rates of fare and freight, to be charged for the conveyance of persons and property on its railroad, free from all control by the state. If, on examination, we find that no such grant was intended, it will be unnecessary to decide whether one legislature has the power to bind succeeding legislatures by a contract to that effect."

So in the case at bar, if upon examination of such statutes recited in the bill as are valid, it shall appear that no such grant was made, and no such contract entered into as is claimed by the plaintiffs in the bill, then their bill must fail.

In the same case, at page 534, the court says:

"It is undoubtedly true, as was claimed in the argument and has been often stated from the bench, that *amendments to charters of corporations are usually made at the solicitation of the corporations themselves*, who cause the bills to be prepared and submitted to the legislature for enactment, and that if there is doubt as to the construction of what is enacted, this fact may be resorted to in aid of the interpretation."

At page 531, the court stated another principle applicable to the case at bar, viz:

"*Grants of immunity from legitimate governmental con-*
"*trol are never to be presumed;* on the contrary, the pre-
"sumptions are all the other way; and unless the exemp-
"tion is clearly established, *the legislature is free to act*
"*on all subjects within its general jurisdiction as the pub-*
"*lic interests may seem to require.* As was said by
"Chief Justice TANEY, in speaking for the court in
"*Charles River Bridge* v. *Warren Bridge*, 11 Peters,
"420–547: '*It can never be assumed that the government*
"*intended to diminish its power of accomplishing the end*
"*for which it was created.* This is an elementary prin-
"ciple.'"

If the construction of the charter claimed against the convenience and necessities of the people of the state and of the city of Chicago is at all uncertain, the construction must be in favor of the public right.

Stormfeltz v. *Manor Turnpike*, 13 Pa., 555, 559, 560.
Northwestern Fertilizing Co. v. *Hyde Park*, 97 U. S., 659.
Stein v. *Bienville*, *W. S. Co.*, 141 U. S., 67, pp. 80–1.
The Binghampton Bridge, 3 Wall., 51, p. 75.
Hamilton G. L. Co. v. *Hamilton City*, 146 U. S., 258.

In *Fertilizing Co.* v. *Hyde Park*, 97 U. S., 666, this court laid down this doctrine:

"The plaintiff in error claims that it is protected by "its charter from enforcement against it of the ordinances "complained of, and that its charter is a contract within "the meaning of the contract clause of the constitution "of the United States. Whether this is so is the ques- "tion to be considered. The rule of construction in this "class of cases is, that it shall be most strongly against "the corporation. *Every reasonable doubt is to be re-* "*solved adversely; nothing is to be taken as conceded but* "*what is given in unmistakable terms, or upon implication* "*equally clear.* The affirmative must be shown; *silence* "*is negation, and doubt is fatal to the claim.* This doc- "trine is vital to the public welfare. It is axiomatic in "the jurisprudence of this court."

Statutes in favor of corporations or particular persons and in derogation of common right, are not to be extended beyond their express words and their clear import.

Bloodgood v. *M. & H. R. R. Co.*, 18 Wend., p. 41, pp. 52–3.
Sprague v. *Birdsall*, 2 Cow., 420.

It has also been decided that a state cannot, under form of contract, alienate its police power.

Sedgwick on Statutory and Constitutional Law, 588, note.

O. & M. R. R. Co. v. *McClelland*, 25 Ill., 140.

Thorp v. *R. & B. R. R. Co.*, 27 Vt., p. 249.

I. & C. R. R. Co. v. *Kercheval*, 16 Ind., 84.

Cooley Const. Lim., 710 *et seq.*

Applying this principle to the case before us, it is apparent that the state could not alienate its power to put an apron or plank covering over a dangerous or offensive ditch (or to require that duty from the municipal corporation), by any contract with any person or corporation that it might erect a toll-gate. Yet the claim of the plaintiffs below, as shown by their bill and their brief, extends to demanding that the city shall keep its hands off, entirely.

To entitle the plaintiffs below to maintain their bill, they were bound to show by preponderating evidence or matter of law that they were the beneficiaries of grants, of so broad a scope as to exclude the state from legislating upon a subject that was wholly within its power, but for such exclusion. (*Gleason* v. *Village of Jefferson*, 78 Ill., 399.)

The bill is a direct assault upon the clause of the Revised Statutes, forbidding the keeping of a toll-gate within the corporate limits of the city, for a court of equity will never exercise its preventive powers to aid a party in doing an illegal act. (*The City of Chicago* v. *Wright*, 69 Ill., 318.)

And if the keeping of a toll-gate there was illegal, that is, if the statute forbidding it was valid, the bill seeks the aid of a court of equity to protect it in doing an act prohibited by the general law of the state.

In considering the statutes under which the plaintiffs below seek relief against the city, and against the execution of the general laws above quoted, the rule of construction which is applicable to other statutes seems also proper to be considered, that is, *cessante ratione cessat ipsa*

lex. "The intention of the lawmakers may be collected "from the cause or necessity of the act, and statutes are "sometimes construed contrary to the literal meaning of "the words." *Castner* v. *Walrod*, 83 Ill., p. 179. And it certainly should have application to the construction of ambiguous terms or phrases, under which plaintiffs in error claim a privilege to build a toll-road and to operate a toll-road *from the city limits* of Chicago to the county line of Cook county, and claim that the grant was intended to extend from the point where the city limits were in 1854, and that all of that road would remain within the power to erect toll-gates, and to fence everybody out from it, and to be operated confining all the traffic to a plank road 8 feet wide, or 16 feet wide, if that was the width fixed at the time of the charter, notwithstanding that the city might grow about it, so that it should extend from the very heart of the city, out through the most densely populated part of the metropolis. They contend that the legislature intended to build a Chinese wall around this diagonal road, and, let the city grow as much as it would, let its needs be as great as they might be, still the people along Milwaukee avenue must forever look backwards to 1854, and have this same road, and the same provisions made for them, and no greater provision than was made to extend from the city limits, at that time, to the county line. That such should have been the intention of the legislature is preposterous, unless we credit that body with entire want of foresight, and with the belief that Illinois had reached its maximum and that the city of Chicago was never to be any greater, and the population gathered there were never to have any higher wants, any greater police protection, any more ample and commodious means of travel over the highways beyond the then city limits, than they required in 1854. To attribute such ideas to the legislature or to any contracting parties would be to attribute to them the most absurd views.

Milwaukee Avenue is a diagonal street in a city of rectangular blocks. It leads to the heart of the city, and all streets in that *quarter* of the city, over which people pass to reach the center of the city lead into Milwaukee avenue, and through that to the center, and to all the rest of the city.

Doubtless the legislature in 1854, or before street cars were invented, or even in 1865, did not anticipate what is the fact to day, that ordinary street cars are incapable of satisfying the need of Milwaukee Avenue out far beyond North Avenue, and cable trains of cars having become necessary are now unable to supply the public with the necessary transportation, and an elevated railroad is necessary and is being added to the transportation facilities of Milwaukee avenue. The legislature did not anticipate the speed of the growth of the city, in which the improvements of harbor by the United States in South Chicago (the 33d ward), and the accession of manufactures in that and the adjoining ward, had gathered 100,000 workmen, and caused to be built in 1891 and 1892 more miles of street car lines in those two wards with greater passenger facilities than all the lines in the city of Washington. Such growths are matters that courts, as well as legislatures, observe, and probably every judge of this court saw it in the South Chicago region, South of the World's fair, where, up to 1875, it was known as the Calumet Marshes, where there was not a swing bridge, and not a single manufacture of any kind in operation, except the working up of dead animals by the Northwestern Fertilizing Company which was placed there in 1866 because there was no one for miles around who would be affected or annoyed by the stench of that business, and which gave way to the growth, as shown in Northwestern Fertilizing Company v. Hyde Park, 97 U. S., 660.

Such growths as these, of which Milwaukee Avenue is one center, may not have been anticipated in detail by the legislature of Illinois. Not a member may have read of Claude Duval, or have read any other novel, story or history locating acts of generations before in inhospitable wastes, or on solitary moors which at the date of the writing of the story were within the densely inhabited parts of London; yet *this court must view the Constitution of the United States as framed to meet and to provide for such settlements of the people as time may develop or compel.* That instrument is based on "*inalienable*" rights, and was framed for the good of the people, as they shall be found. It was not its object to protect one generation in

an attempt to deliver into bondage all the succeeding generations, who may inhabit one locality, or to guarantee and make certain the alienation of inalienable rights. Cities of India, of China and of the historical world, had reached to millions; London had already covered great space; and, though the United States had no land upon the Gulf, or beyond the Mississippi, or on the Pacific Coast, though DeWit Clinton had not figured how much potash could be produced by burning the forests of Ohio, to give freight to support the Erie Canal, when the Constitution was adopted, still that Constitution was a provision for the largest cities that may ever be on the Pacific Coast, the Gulf, the Mississippi or the lakes, or off from them, though they number hundreds, and exceed in size the largest cities ever known.

The Constitution required the congress to guarantee to the several states, a republican form of government in each state. That is the principle of the Constitution. To ascertain the law contained in the instrument it is necessary to read all together: the part relating to the obligation of contracts with part requiring the governments of states always to be republican in form; that is, that all laws shall be passed by, and shall be at all times within the power of repeal, by the people themselves or their representatives

All statutes of states are to be read in view of the objects for which governments are formed, and in view of the Constitution of the United States, and in harmony with its principles, and the paramount objects of its adoption, and the guaranties that it gives.

The common law was adopted as the law of Illinois in 1821, and it was made a rule of decision, the phrase adopted being, "that the common law of England, so far as the same is applicable and of a general nature, * * * shall be *the rule of decision* and shall be considered as of full force until repealed by legislative authority." This was retained as Section 1, of chapter 62 of the revised statutes of 1845, also as Ch. 28 of the Revised Statutes of 1874, and by its terms the common law was made a rule of decision, as well in the construction of statutes as for any other purpose.

Under the common law, and in the case of *Hammond*

v. *Brewer*, 1 Burrow, 376, the question was, on the interpretation of an act of parliament for repairing and widening the road from Flemwell Vent to the town of Hastings, and the single question was, whether the town of Battel was meant to be included or excluded. The question arose on that part of this turnpike act which gave directions for repairing the road *to and from* the town of Battel, and the question was, whether the act intended to include or exclude the town of Battel itself. The courts were clear that the act apparently intended to exclude the town of Battel, and that it was right and reasonable that it should be excluded, and Lord Mansfield observed that "it was neither usual nor convenient to erect toll gates in the middle of great towns, which these commissioners had done; *which might obstruct the necessary intercourse amongst the inhabitants*, or even hinder an inhabitant from sending his horse to water, without paying the toll." That was in 1757.

In 1850, the case of *Regina* v. *Cottle*, 3 Eng. Law & Eq., 474, was a case of an indictment against a turnpike company, for erecting a turnpike gate under a statute which provided it should not be lawful for the said trustees to continue or erect any turnpike or toll gate across the said roads in the towns of Taunton and Wellington, or in any other town through or into which the said roads might pass or be made. It was objected for the defendants that the prohibition in the statutes applied only to the erecting of a gate within the limits of the town of Taunton as it existed in 1840, when the act was passed. The court by Lord CAMPBELL, chief justice, said, after the court had taken the case under advisement: "In this case having expressed our approbation of the "direction of the learned judge to the jury * * * we "took time to consider the point upon which leave was "reserved to enter a verdict for the defendant, namely, "whether the prohibition to continue any turnpike gate "across roads in the town of Taunton, applies to the "town as it was on the 19th of May, 1840, when the act "passed, or as it might be, at any time during the thirty-"one years, for which the act was to be in force. We have "come to the conclusion that the latter is the just con-"clusion. Whatever inconvenience might arise from

"authorizing the erection of a turnpike gate in a place "which, when the act passed, had been in the country, "and, before the act expired, had become near the cen- "ter of a great town, *if there had been a clear enactment "to that effect, we must have been bound by it*, but looking "at the language here employed, *we think that the legis- "lature contemplated the probable increase of Taunton "within a period longer than that generally shown for a "generation of the human race, and intended that its in- "habitants as it increased, should be exempt from the an- "noyance of a turnpike gate cutting off a free intercourse "between neighbors in the same street.*"

We ask particular attention to these English cases, because the principle is such as to render it clear, that the legislature never intended, that any part of the toll roads referred to, in the statutes of 1854 and of 1865, quoted in the bill, should ever extend within the city limits, if the legislature, should, from time to time, find it necessary to public good to move the city limits outward toward the county line. The toll road should *always* be *from the city limits* of the city of Chicago to the county line.

In the case of the *Salem & Hamburg Turnpike Company* v. *The Town of Lyme*, 18 Conn., 451, A. D. 1847, it was claimed by the turnpike company, that the legislature having chartered their turnpike company and authorized them to take tolls, and exercise the franchises given in order that there might be a highway from the town of Lyme through the town of Salem, to the city of Norwich, the town of Lyme could not afterwards parallel this road: but the court stated the general policy of the law, and *the conditions that must be supposed to have entered into such statutes*, and said: "The new road may "somewhat and very greatly impair the value of plaintiff's "franchise, as is the effect in numerous cases where a "parallel new road, canal or bridge, or railroad is made "between the same points or near them. If the public "travel requires new or improved facilities, it is the right, "even the duty of the public servants to make them or "allow them to be made. This is a well-known condi- "tion upon which the plaintiffs took their charter, and "they cannot complain if common convenience and neces- "sity require a new road."

Again, upon page 457, the court cited the case of *The Charles River Bridge* v. *The Warren Bridge*, in which it was said that "it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created," and proceeded to say on page 457, "New facilities for public accommodation must be created as they are needed. The legislature or subordinate tribunals by the legislature intrusted with discretion, must judge wisely and fairly on the subject."

In *Stormfeltz* v. *Manor Turnpike Company*, 13 Pa., 555, in 1850, it was stated on page 558: "That there cannot be two distinct corporations created in the same place with the same rights, properties and privileges and similar powers." Citing Wilcox on Mun. Corp., and a large number of authorities. And this was said with reference to the powers of a municipal government and the power of a turnpike company to maintain a toll gate within the limits of the city of Lancaster in Pennsylvania.

This is a leading and important case. The Manor Turnpike Company was incorporated in 1839. The road authorized by that act was to be laid out from the commencement of Manor street, where the same intersects with West King street, in the city of Lancaster, along the said Manor street or road to where the little Canastoga creek crosses the same. The company was invested by said act with the power of collecting tolls. A supplementary act was passed in 1848. The second section directs that the point of commencement of said turnpike road shall be where Manor street intersects West King street, in the city of Lancaster, and shall extend along the Manor road through the village of Millerstown, with power to erect gates and toll houses on or across said road. The fourth section provides that the president and managers are authorized to erect *such toll-gates as are necessary* along said road, either *in Manor street or elsewhere*, for the proper collection of tolls, and the question was, whether the proper construction of that act permitted the erection of a toll-gate on Manor street within the limits of the city of Lancaster, over three-quarters of a mile of the turnpike road being made by the com-

pany, in the city of Lancaster, from the intersection of King street to the city limits. The opinion of the trial court was that the turnpike company had the power to erect a toll-gate in the city; but the Supreme court, after most careful consideration, said (p. 559): "The power "of the legislature to establish a turnpike company in "streets or public ways of a city is hardly to be ques- "tioned. It is a part of the eminent domain which be- "longs to the sovereign authority. It is conceded to the "General Assembly, by the grant of all legislative power, "and is not restrained by the bill of rights. There is "nothing in the street, or town or city, to make it greater "or more distinguished than a highway in the rural dis- "tricts, except convenience and the density of popula- "tion; and these restrain not the power of legislation. "The power of making and repairing roads and remov- "ing nuisances, is granted by law to supervisors of high- "ways under the direction of the courts, and they are "bound to do it; yet this does not prevent the legislature "from authorizing turnpikes, and the erection of gates "on these roads. Neither does the obligation of cities "to open and repair streets, interpose any barrier against "the right of the sovereign power to regulate its high- "ways: and streets in a town or city are nothing more.

"*But the inconvenience to citizens and to other persons* "*transacting business in a city would be so grievous that we* "*cannot presume that the legislature intended to authorize* "*the erection of a gate in the streets of a city, unless the* "*enactment is so clear as to leave no room for a reasonable* "*doubt.* The constant passage of drays, wagons, carts "and other vehicles from one part of a city to another, "in pursuit of the business, trade, agriculture and com- "merce of the country, requires that the streets should "be open. In many places the stoppage to pay tolls would "block up and stop the streets, and as the toll-gatherer "would have to seek shelter from the vicissitudes of the "weather, a barrier would at times be interposed, with "no person at hand to open it. In the case under con- "sideration, although the gate is at the verge of the con- "tinuous line of houses, yet if the company can erect it "there, they may erect a gate as far up the city as King "street. *It was well known to the legislature that the*

"*city* of Lancaster, in the garden of the state, *would, in* "*process of time, become a mart for manufactures* and "commercial and agricultural products, *and extend to its* "*utmost limits.* Where then was the necessity or pro- "priety of granting to a turnpike company the privilege "of obstructing the streets, and hindering the business "of the city, when full power was granted to the muni- "cipal corporation to keep those streets open and in "good repair, and which it was compellable to do at the "instance of any person. *We are reluctant to impute* "*any such intention to the legislature until they use words* "*of more imperative and distinct signification than those* "*on which the turnpike company relies.* We have no "doubt whatever that the legislature may alter, modify "or repeal the charter of a city making compensation "for private rights, which might thereby be invaded or "destroyed. But when they intend to do so, it is but "fair to the municipality and to the public to presume "that they will say they intend to revoke privileges al- "ready granted, and alter a solemn deed already made.

"*In the construction of a statute granting privileges to* "*individuals, where there is ambiguity or inconsistency in* "*the language of the grant, if one construction bear against* "*the public trade and public convenience, and another* "*abridges the grant, that must be adopted which favors* "*the public convenience and trade,* 3 Stephens, N. P., "2,619; 5 Denio.

"The enjoyment of the franchise or privilege granted "to the turnpike company, does not necessarily require "that a gate should be erected in Manor street, within "the city limits. By placing a gate outside the city, the "object of their erection will be fulfilled, and the con- "venience and business of the city protected, and both "grants, that to the city, and to the turnpike, will be "harmonized."

So the court were of opinion, that, though the letter of the statute authorized the erection of turnpike gates, anywhere on Manor street, yet the statute must be construed by the public necessities, and by the wants of the people of the town, and must be held to have intended to exclude it from erecting a gate within the city of Lancaster. So the court says:

"We are therefore of opinion that the city of Lan-
"caster, having given full notice to the turnpike com-
"pany not to erect a gate on Manor street, in said city,
"were guilty of no wrong in ordering it to be removed,
"as a nuisance or obstruction in said street; and that
"Stormfeltz, the street commissioner, was not guilty of
"a trespass in removing the said gate in pursuance of an
"ordinance of the city and councils.

"Wherefore, the judgment of the court below, on the
"stated case, is reversed, and judgment is entered for
"the defendant in the said case."

In looking at the statute cited in the bill, the court will see that the plaintiffs in the bill claim the most liberal construction in their own favor, and claim that, *by inference only*. They claim the corporation had power to construct the road *from the city limits* of Chicago to the county line of Cook county, and to erect toll-gates at any point along that route that might be convenient to them. And from that the plaintiffs argue that the corporation possessed the right to erect toll-gates within the city limits of Chicago after the legislature should have extended the city limits, and to maintain them there, notwithstanding the growth of the city. And it is apparent also that the plaintiffs claim that the obligation of the plank road company would be no greater as to the maintaining of the road, and the kind of road that it was to construct after the city should have extended out along it for some considerable distance, and a dense population should occupy both sides, not only of the street itself, but of the adjoining country.

It is the claim of the bill that the city cannot interfere with the toll-house, the shed 4 x 6, in order to put an apron or protection over a dangerous or offensive ditch; that the city can not run its water-pipes and gas-pipes and sewers through that road so as to tear up and destroy the eight foot wide of plank or gravel; that it cannot send its fire-engines and its police patrol wagons through that road and through the toll-gates upon it or where the toll-gates are; that however dense the population may become and however dense the traffic upon the street may be, this company may continue to maintain just eight

feet wide, or whatever width was the proper width of a plank road at the time that they claim the charter to have been gotten, and to build four or more toll-houses on each block on all the rest of the road, occupying it and excluding the people, and that the whole population *for all time* must be held down to the condition of 1854, tied hand and foot by a perpetual grant of power over that locality made by the state, and fastened upon the people by the shackles of inviolable contract.

When the Michigan cases, cited for plaintiffs in error, were decided, there seems to have been on the part of the judges a want of consideration of such cases as that in the 18th Conn., and in the 13th Penn., which were adapted to a growing community; and the cases in this, the Supreme court of the United States, which we have above cited, had not then arisen, but arose and were decided long afterwards. The present consideration of these statutes, is in the light of the decisions of this United States Supreme Court: the court of last resort, in passing upon just such questions, as whether such a statute as that prohibiting toll-gates within city limits, and that granting to the city of Chicago the power over its streets, are violations of a contract contained in the pretended charters of the plank road company.

In the case in which the claims of these very parties were presented to the Supreme Court of Illinois, namely: *Snell* v. *Buresh*, 123 Ill., 151, the court held the true construction of the pretended charters to be against the claims of the appellants, and against the express words of the acts; construing them strictly, against the claimants of the toll-road, and holding that they had no right to put their toll-gate on Milwaukee avenue at the particular point they claimed in that case. That was as far as that case required the court to go, and the court held that if it should admit that the Snells had all the rights apparently given by those statutes, still the statutes must be construed in favor of the public convenience, and against their express words.

Counsel claim in their bill that Snells' predecessors obtained the right from the board of county commission-

ers to build a road from the city limits to the county line. They do not aver that they ever built such a plank road. On page 10 of the record they aver six miles or thereabouts. On page 10 they aver that the corporation was in possession from North avenue, then the northern limit of the city of Chicago, to a point on said Milwaukee avenue six miles or thereabouts northwest from said intersection; and there is nowhere in the bill an averment that they have ever built a road from the city limits to the county line. It is very clear that an averment of possessing six miles must be held to be an averment that they hold *only that distance*, between the two termini stated in the other part of their bill. For if the averment had been intended to be, that they possessed and built a road upon all of the distance from the city limits to the county line, they would have said so, and not that they built six miles from one end of it.

Upon this point we will refer the court to the case of the *Franklin & Columbia Turnpike Company* v. *Campbell*, 2 Humph. Tenn., 467, in which it was held that the turnpike company could not lawfully collect tolls upon the turnpike road when it had failed to build it a quarter of a mile of the whole distance, and had used the county bridge to cross the river to Franklin.

Another case upon the same subject is *Griffin* v. *House*, 18 Johnson, 397; *State* v. *Douglas Co. Road Co.*, 10 Or., 185.

In considering these statutes it may also be remembered, that it has been determined that the city has jurisdiction to pave the street, notwithstanding the right of a turnpike or plankroad company to maintain its road and collect tolls upon it.

Bagg v. *Detroit*, 5 Mich., p. 345.
StateNew v. *Brunswick*, 1 Vroom, 396–7.

It has also been held that the city has power to fill up such a street.

The State v. *Jersey City*, 26 N. J., (2 Dutch.) 444, p. 446.
Bordentown, &c., Co. v. *C. & A. R. R. Co.*, 17 N. J. (2 Harr.), 320–1.

In these cases, or nearly all of them, the charters of the toll-road companies had existed long before the chart-

ers of the cities or towns, and the powers granted to the cities or towns were held, so far as the decisions were required to go, to extend over the streets, and to vest in the municipal authorities power to improve those streets as though the toll-road charters had not existed.

The statutes recited in the bill, at the most are no more than mere licenses revocable at any time, and the charters of Chicago and extension of the limits were sufficient to revoke them.

Rundell v. *The Del. & Raritan Canal Co.*, 15 How. U. S., 80, pp. 88, 89, 92, 93.

Snell v. *Buresh*, 123 Ill., 151.

Monongahela Nav. Co. v. *Koons*, 6 W. & S., 101.

Susquehanna Canal Co. v. *Wright*, 9 Watts & Sergeant, 9.

Northwestern Fertilizing Co. v. *Hyde Park*, 97 U. S., 659.

We quote from the opinion in the last mentioned case at page 670. The court said: "*The charter was a suf-*
"*ficient license until revoked, but we cannot regard it as a*
"*contract guaranteeing in the locality originally selected*
"*exemption for 50 years from the exercise of the police*
"*powers of the state, however serious the nuisance might*
"*become in the future, by reason of the growth of the pop-*
"*ulation around it.*"

The claim of plaintiffs in error, is that they were guaranteed exemption, not for 50 years only from the exercise of the police power of the state in the locality of Milwaukee road, as it existed from the city limits of 1854, to the county line, but they claim perpetual exemption in that locality; and, while those statutes might possibly be considered, if they had any authority, as a sufficient license until revoked, to avoid even a *quo warranto* proceeding, yet they cannot be regarded as a contract guaranteeing in the locality originally selected, perpetual exemption from the exercise of the police powers of the state.

By general law in force in and prior to 1865, it was provided: That at the expiration of the corporate existence of any plank road company by expiration of the term of its charter, if the road shall have been constructed upon any public highway or street, the county in which said road is situated shall pay to said company the value of the plank superstructure of said road. And the section provides for ascertainment of the value to be paid. (*Gross Statutes* 501 Sec. 38.) *The franchise was distinct from the property.* This distinction has been marked since that time in our revenue laws, and many decisions made on the distinctions. The apparent intent of the sections of the Act of 1865 was, first, to allow Cook county to buy the franchise and all the property, and extinguish the corporation, and open the road.

But the sections provide for sale and deed of the property, as well as the franchise, to private persons. *The sale of the property was not mentioned in the title. The title was limited to the franchise. By the express terms of the title the company was to be authorized to sell nothing but its franchise*: *Taylor* v. *Kirby*, 31 Ill. Ap., 658, p. 659; and the property would go to the County at an appraisement under the general law. (*The People* v. *Mellen*, 32 Ill., 181, p. 183; *The People* v. *Inst. of P. D.*, 71 Ill., 229, p. 233; *N. C. C. Ry. Co.* v. *Lake View*, 105 Ill., 207, pp. 213–4.) But the act authorizes, first, sale of the franchise, property and immunities of the company, and dissolution of this corporation; second, conveyance thereof by deed; and third, that the pur-

chaser or purchasers of said franchise and road shall be bound by all the obligations said Northwestern Plank Road Company is by its charter, and shall enjoy all the rights and privileges enjoyed by said company, and no more.

The franchise of said company, as claimed by the bill, was, *to be a body corporate, to sue and be sued, to have perpetual succession, together with all other rights and ordinary powers of a body corporate*, and as such to maintain a plank or toll-road and take tolls, etc. (*Morawetz on Corporations*, Sec. 535, 538, 4, 27.) The effect of the grant of the franchises, together with the tangible property, was to charter a new corporation. (*Morawetz*, Sec. 539. *Doe* v. *Beidleman*, 125 U. S., 680.)

This subject is not embraced in the title of the act of 1865; but is excluded by it. *Taylor* v. *Kirby*, 31 Ill. Ap., 658.

Counsel claims that the company could sell its property other than the franchise without an enabling act.

It would seem to have been the desire of the counsel that this claim should be passed with the mere statement and without consideration. A corporation created for a specific purpose, as to build and own and operate a particular railroad, or a particular plank road, cannot, without express authority in the act of incorporation, either mortgage or sell the property that is essential to the object of its creation. A corporation is so much the creature of the act creating it, that it seems necessary to insert in such acts a power to sue and be sued, and it certainly is necessary to insert in such acts a power to buy and to sell property to vest the corporation with power to do such acts. *Ante* we have referred to the general enabling act, or rather, to the explicit provision that when a plank road corporation should cease, its property should go to the county. The right of public highway over any road operated by a plank road company, would, by common law, pass to the public, and, by the statute, we have seen that where a plank road corporation ceased to exist, the county was compelled to purchase the superstructure

upon such road, and the defunct corporation was compelled to sell to the county and to no one else. The statute mentions the ceasing to exist by lapse of time of the charter, but the object of the act is such that it must be considered according to its purpose, and these words are taken by way of example, and *the statute applied in any case where the company ceases to exist.*

Another feature to be considered in the interpretation of this act of 1865, is that

The general policy of the laws of the state was to limit the corporate existence of plank road companies to thirty years, and, by compelling the purchase of the superstructure by the counties, to throw open all such roads as free public highways as often as thirty years, while, as the counsel very distinctly point out, this corporation, or pretended corporation, was to be a perpetuity, and to have a perpetual monopoly of its route. Statutes tending to create or establish perpetuities are to be strictly construed. Taking all these considerations together, it would appear that the legislature might have been willing to allow this company to sell its franchise—the Governor and the people around the route, or who were interested in the route, who were advised of the title of the act, might have been willing to have the county of Cook, or any public spirited citizen, buy that franchise, and thus dissolve the corporation, the superstructure of the road going to the county under the general law, and still they might have been entirely unwilling to have the road and all the rights to collect toll and be protected by heavy fines and penalties passed to a private individual, and to his heirs forever—a monopoly in perpetuity.

And here comes another consideration, for the interpretation of the statute of 1865, derived from the view of the counsel presented in their argument, that it is lawful, under that statute, for A. J. Snell to purchase and pass to his heirs and their heirs, forever, this monopoly in perpetuity, as private property; they not becoming a corporation, not being required to become a corporation, or to be amenable to the laws which impose forfeitures on corporations for failure to perform corporate duties. The counsel claims that this plank road has become the prop-

erty of Snell, and all the franchises for collection of toll, etc., just like the property in a piece of land. That no amendment could add any burden or any forfeiture to the charter contract which throttled the power of the state. That the legislature could not require the road to be inspected, or compel the owner to pay the expenses of the inspection, or impose a forfeiture, because it would not pass inspection. Looking at the bill of 1865 with its innocent title, we find no such consequences foreshadowed by that title. If such consequences had been anticipated, the persons interested would have had good reason to remonstrate and to exercise their franchise as citizens in petitioning against such a course. Why, the necessary result of such transmission would be to pass the road to imbecile hands. But a few years could elapse before the heirs would find that they wanted to partition the road among themselves. By section 5 of the Act of 1865, they should enjoy the privileges enjoyed by the original company, and no more, *therefore they could not sell*, and the road must be transmitted from ancestor to heir by descent, and could not be sold to effect a partition among the heirs. If it could be divided up, it must, from time to time, be subdivided into minute fragments. If, on the other hand, it could not be partitioned, the succession would pass in the usual way, and a proportion of the heirs would be infants, married women, insolvents or impecunious persons, and the state would have no one that it could compel to keep the road in order; and there would be no responsible body to keep that road in order. In view of these necessary consequences, it is apparent that the usual rule as to statutes granting such franchises, as to statutes creating such perpetuities, as to statutes in derogation of the common law, as to statutes in derogation of the general policy of the state, must be applied.

And it is very clear that the corporation could not sell its property without an enabling act, or send it in a direction different from that provided by the general law of the state.

We may grant that the franchise would be of no value without the property, but that is no argument, that the authority to sell the property can be contained in the act when it was not expressed in the title. The public might

have been willing that the franchise should be sold in any way to extinguish it, but were not willing that the property should be sold in connection with the franchise, so as to continue that franchise to blockade a great route of travel in perpetuity, and to place the road in the hands of infants, or of any one, who, in the nature of things, would be inefficient in keeping it up in such order as it ought to be kept.

No case can be found where the exercise of an unlawful act or the commission of transgressions against the law by any citizen, however long continued, have been held to work a forfeiture of the right of the state to enact its laws under and by virtue of the omnipotent power referred to in the brief of counsel, or to enforce its laws which had been passed in conformity with the requirements of the constitution. This seems to be the first case where any counsel has attempted to make out a contract, by implication or acquiescence in irregular or unlawful acts, of so high and solemn a nature as to bind the state, and to bring into action the tremendous power of the federal Constitution, where it prohibts the passage of any law impairing the obligation of the contract, and nullifies the most solemn statutes of a state. That this tremendous power may be invoked, was established by the Dartmouth College case; but that it will not be invoked or allowed application in any doubtful case, or in any such case as is presented by the appeal before us, is determined by all the recent judgments of the Supreme court of the United States.

This court held in *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, that, in order to constitute a violation of the constitutional provision against depriving a person of his property without due process of law, it should appear that such person has a property in the particular thing of which he is alleged to have been deprived.

The threatened infringement of plaintiff's right alleged in this bill, was that the city would move the little toll house far enough to allow it to put a cover over the ditch on the south side of Milwaukee Avenue. If this

threat were carried out it would not be a deprivation of property, within the meaning of the 14th Amendment to the federal constitution.

The averments on this subject were not sufficient to raise a federal question. *Yesler* v. *Washington Harbor, L. C.*, 146 U. S., 646, p. 656.

The right of states to impose police regulations like Section 1,996 of the Municipal Code of Chicago, and enforce them by penalties against chartered bodies like the North Western Plank Road Company is recognized.

M. & St. L. Ry. v. *Emmons*, 149 U. S., pp. 367–8.

The decisions of the Supreme Court of Illinois that certain statutes were void, that the deed to Snell was void because the county had not failed to purchase; that it was void because it was an attempt to sell part of the franchise; that the thing offered for sale was not inheritable and could not pass to the widow, heirs, or administrators of Snell; that the right of perpetual succession could only have been maintained if Snell had organized a corporation; and that lapsed because he bought after the Constitution of 1870 was adopted and before it took effect, and Snell failed to organize his corporation within the time allowed by that constitution—these decisions did not raise a federal question.

Bier v. *McGehee*, 148 U. S., 137, pp. 141–2.

The decision of Illinois on the law governing the pleadings in this case, and *on the law governing the construction of the statutes and supposed contracts*, raises no federal question.

Morly v. *Lake Shore Ry.*, 146 U. S., 162, pp. 166–7.

Thorington v. *Montgomery*, 147 U. S., 490, p. 494.

The power of State legislatures to exert all ordinary police powers over chartered corporations, to tax them, regulate their rates, and regulate the use of their property, notwithstanding supposed conflict with their charters, has been often considered.

C. & G. T. Ry. Co. v. Wellman, 143 U. S., 339.

N. O., C. & L. R. R. Co. v. New Orleans, 143 U. S., 192, pp. 195–6.

The exercise of the police power does not invade property rights, so as to violate the provision of the constitution of the United States.

Budd v. New York, 143 U. S., 517.
Munn v. Illinois, 94 U. S., 113.
Natal v. Louisiana, 139 U. S., 621.
Giozzo v. Tiernan, 148 U. S., 657, pp. 661–2.

The learned counsel answer with a sneer the assertion of the Supreme Court of Illinois that the toll road charter construed as the counsel would construe it, would "contravene the spirit if not the letter of the constitution of 1848," and say that the assertion that the exaction of a toll is a tax, is a novelty, and that it had long been understood that "tolls are but equivalents for the privilege of travelling upon a road."

The learned counsel must be in sad straits to be drawn to resort to such an assertion, based upon the assumption that opposite counsel are ignorant, and the court forgetful.

The imposition, by or under the legislative power of a state, of a toll for passage over a public highway must be classed as a branch of the taxing power (*Gibbons* v. *Ogden*, 9 Wheat., pp. 201-2; 1 BLACKSTONE COM., 313, 321). Blackstone says, p. 313: "The perpetual taxes are (1), "The customs. * * The considerations upon which "this revenue was invested in the King were said to be "* * because the King was bound of common right "to maintain and keep up the ports and havens."

Page 321: "Another very considerable branch of the "revenue is levied with greater cheerfulness, as, instead "of being a burden it is a manifest advantage to the pub-"lic. I mean the post-office or duty for the carriage of "letters." * * "The government acquires a large "revenue; and the people do their business with greater "ease, expedition, and cheapness, than they would be "able to do *if no such tax* (and of course no such office) "existed."

Webster's Dictionary gives the definition of TOLL: *A tax* paid for some liberty or privilege, particularly for the privilege of passing over a bridge, *or on a highway*, or for that of vending goods in a fair, market or the like.

REPLYING SPECIFICALLY

to parts of the Brief for plaintiffs in error we note:

(1.) The counsel made a mistake as to when and under what laws the city limits of Chicago were extended after 1854.

They were extended by special acts as far as to Fullerton Avenue on the North, and Western Avenue on the West before the adoption of the constitution of 1870. These extensions did not take in the "toll-house in question"; but afterwards, under the general act of 1872, they were extended westward beyond the crossing of Milwaukee and Fullerton Avenues.

The laws under which the limits were extended require the courts to take judicial cognizance of such extensions, when they shall have been proclaimed by the executive officers of the state.

(2.) The counsel give a definition to incorporeal hereditaments, and a quotation stating that a right of taking toll at bridges, &c., are such; but they furnish no authority showing that a franchise or right to form a corporation, and thus become capable of perpetual succession, is an hereditament, especially after the right to exercise the franchise has been barred by a constitutional enactment; nor do they cite authority tending to show that the Supreme Court of Illinois was wrong in holding that the franchise coupled with the burdens was not intended by the legislature to be an hereditament that could descend and *be distributed* from generation to generation. By the charter it could not be sold; the purchaser could have rights and powers of the former corporation *and no other;* that could not sell. Therefore the rights must, under the counsel's argument, descend and be divided up in geometrical progression from generation to generation. The Supreme Court of Illinois was right in holding that the Legislature did not make the franchise an hereditament.

(3.) The counsel suggest that the corporation may have abandoned part of the road and franchise under general laws; that part of the road was outside of the city limits and is no concern of the city; that the city can not attack the franchises of the Snells, collaterally, but that they can only be assailed by quo warranto.

The difficulty with their position is that *they are assailing the franchises of the city. They are asking that officers be forbidden to obey a general law.*

The burden of averment of every fact necessary to their right, and of proving such facts, is on them; and they have no averments in their bill on which to base their claims.

They assert that there was a contract, and it is denied; that denial is not precluded because this is not a proceeding by quo warranto; but it devolves on plaintiff in the bill to aver and prove a valid contract, which requires that they should prove every fact necessary to a contract.

In an action at law by a corporation, if general issue is pleaded, the plaintiff must prove its incorporation.

Again, as plaintiffs assail the city's franchises and charter, and the acts of an officer in obedience to a general law of the state, it devolved on them to aver and prove *every fact necessary to prove that defendants were proceeding illegally.*

(4.) The counsel cite 37th Michigan and earlier cases, and say that these cases were cited by them to the Supreme Court of Illinois, "but were apparently overlooked by the learned judge who prepared the opinion."

They were so cited by the counsel, and the reason why they were not mentioned by the Supreme Court of Illinois may be suggested by our answer to the citations made in our brief in that court, which was as follows:

"Counsel for appellants cite a case from the 37th "Michigan, and the cases there cited, to show that such "a statute in Michigan was held to confine itself, and the "locality, to the condition at the time of the passage of "the act. The language of the statutes of Michigan re- "ferred to in her cases is somewhat different, and the "construction might be very different from that of the

"statutes recited in the bill in this case. The case re-
"ferred to by the appellants cites three authorities which
"they probably hoped to have the court refer to without
"comment on our part. One, the 20th Ohio, 7, has this
"syllabus: 'Penal statutes are to be construed strictly,
"and cannot be extended by implication to cases not fall-
"ing within their terms.' That was a case of an indict-
"ment for selling liquor in a certain place, and it was
"held that the place where it was made penal at the time
"of the passage of the act was the only place in which the
"act was prohibited, as the act was entirely local.

"So 114 Mass., 353, was a case where, by the act of
"1871 it was prohibited to use any building for noxious
"or offensive trades, without the written consent of the
"municipal authorities, but excepted from its provisions
"premises then actually occupied, and it was held that
"where the premises were occupied at the time of the
"passage of the act, when the building became old and a
"new one was erected, the penalty would not apply to
"slaughtering in the new building.

"In 36 Mich., 399, it was held that where the home-
"stead law permitted a person to retain a homestead not
"exceeding forty acres, as a farm, when it should not be
"worth more than a certain sum, and was without the
"limits of a municipal corporation, it might still be re-
"tained as a homestead, though after it had been ac-
"quired as such, the municipal limits should extend so as
"to include it, if the value did not exceed the amount
"limited by the statute.

"Those cases rather tend to sustain our view of the
"construction of these Milwaukee avenue pretended
"charters, because the charters are against the pub-
"lic convenience, and they contain severe penalties
"for acts done in the toll-road, and if the authority was
"to construct and control a road *from the city limits* to
"the county line, it would be difficult to sustain the im-
"position of such penalties within the city limits as ex-
"tended. It must be held that the legislature in impos-
"ing those penalties, intended to retain the power in it-
"self to remove them from the operation on the road, and
"to so extend the city limits as to take in such part of it
"as may be necessary when it becomes extremely incon-
"venient for the inhabitants to be blockaded by toll-gates.

"When the Michigan cases were decided, there seems "to have been on the part of the judges a want of con- "sideration of such cases as that in the 18th Conn., and "in the 13th Penn., which were adapted to a growing "community; and the cases in the Supreme court of "the United States, which we have above cited, had not "then arisen, but arose and were decided long after- "wards. The present consideration of these statutes, is "in the light of the decisions of the United States Su- "preme Court: the court of last resort, in passing upon "just such questions, as whether such a statute as that "prohibiting toll-gates within city limits, and that grant- "ing to the city of Chicago the power over its streets, "are violations of a contract contained in the pretended "charters of the plank road company.

"In the case in which the claims of these very parties "were presented to this court, namely: *Snell* v. *Buresh*, "123 Ill., 151, the court held the true construction of the "pretended charters to be against the claims of the appel- "lants, and against the express words of the acts; and con- "strued the acts strictly, against the claimants of the toll- "road."

(5.) Counsel suggest that it was the duty of the County of Cook to seek to purchase.

The amendment was not in force till accepted by secret resolution of the corporation. (*Morawetz on Corp.*, Sec. 14, 15.) There is no averment that any such resolution was ever passed. *Certainly there is no averment that any resolution was ever passed that the franchise be sold*, or which authorized the dissolution of the corporation.

There is no averment that any such resolution was brought to the notice of the county, or that any price was fixed.

If a price one cent higher than Snell paid had been required of the county, it could not be said that the County failed to purchase.

But there was no averment of any fact, and plaintiffs in error were the aggressors; the burden of averment in this suit was on them; and anything not averred does not exist, in the judgment of the law.

(6.) Section 66, so called, quoted at the end of the brief of plaintiffs in error, has no application to this case. It is a section of an Act passed April 28, 1859, which provided that any number of persons might file a certificate of intention, and become a corporation having an existence not exceeding thirty years.

The bill avers that the persons named in it were granted a license by the County Commissioners' court, and organized and did all they did prior to March 1, 1854, *five years before this Section 66 was passed.* Before that time there was no law in Illinois under which the County Commissioners' court could have licensed them for a plank road. Under Chapter 42 of the Revised Statutes of 1845, the company might have been organized and licensed to build a turnpike road. That chapter was cited by the counsel in their brief in the Supreme Court of Illinois as the basis of the authority of the County Commissioners' court to grant a license; and defendants in error (in their brief) answered as follows:

Counsel in their brief at page 8, say, that prior to the passage of the act of February 22, 1849, County Commissioners' Courts were vested with authority to establish toll-roads upon public highways, by license to be granted to proper persons, under certain restrictions and regulations, the county having the right to purchase the toll-road, bridge or franchise, of the licensee, upon payment of the actual cost, with ten per cent. interest, and thereupon the same shall cease to be private property and become a public highway; referring to chapter 42 of the Revised Statutes of 1845.

Turning to that chapter, we find no such authority. The first section provides that "whenever it shall be "considered necessary to establish a ferry or toll-bridge "across any lake, river, creek or any other water-course "within the limits or upon the border of this state, or to "*turnpike or causeway* any public road or highway, it "shall be the duty of the County Commissioners' Court "of the proper county, upon due application being made "by any qualified person or persons, to establish and "confirm the same by a special order, to be made for "that purpose."

Section 2 provides, that "when any ferry, toll-bridge

"or *turnpike* shall be established as aforesaid," and repeated references are made in the statute to turnpike roads, but *not a syllable is contained concerning plank roads*, yet the recital in the bill is that John Gray, Joseph Filkins, Thomas Richmond and their associates, to whom was granted by the County Commissioners' Court of Cook county *a license to construct a plank road* from the city of Chicago to Oak Ridge, and from thence to Wheeling, and to the north line of said county. A plank road could be constructed without a causeway or a turnpike. The planks could be laid over upon the prairie or could be carried upon a gravel ridge without a ditch on either side, or any characteristics of a turnpike, and the chapter in question affords no shadow of authority to the County Commissioners' Court to grant a license to construct a plank road or to create a quasi corporation for any such purpose. (*N. C. Ry. Co.* v. *Lake View*, 105 Ill., 207, pp. 213–4; *Taylor* v. *Kirby*, 31 Ill. Ap., 658, p. 659; *The People* v. *Inst. of P. D.*, 71 Ill., 229, p. 233; *The People* v. *Mellen*, 32 Ill., 181, p. 183.)

HARRY RUBENS,
Corporation Counsel of the City of Chicago.
EDWARD ROBY,
Of Counsel.

ACT OF FEBRUARY 10, 1849,

Of which 14 sections are printed in the bill.

(Private Laws of 1849, p. 70.)

AN ACT TO INCORPORATE THE CHICAGO SOUTH WESTERN PLANK ROAD COMPANY.

Whereas, a license was heretofore granted to Theodorus Doty, by the County Commissioners' Court, in and for the County of Cook, in the State of Illinois, authorizing the construction of a plank road from the City of Chicago to the Desplaines river, and the establishment of toll-gates and the collection of tolls on said road, and, whereas, under and by virtue of the authority granted in said license, the said Theodorus Doty associating with himself Isaac Cook, Robert Huginin, Thomas Richmond, James Peck, James A. McDougall, Theophilus S. Morgan, Festus Clark, Messrs. S. C. Hopkins & Co. and Thomas H. Campbell, under the name and style of "The Chicago and Desplaines Plank Road Company," have proceeded to construct, and have constructed a plank road, commencing at the city of Chicago, on the north line of section seventeen (17), township thirty-nine (39) north, range fourteen (14) east of the third principal meridian, and near the northwest corner of said section, and running thence westerly to the Desplaines river on the north line of section one (1), township thirty-eight (38) north, range twelve (12) east of the thirdp rincipal meridian; and, whereas, the said associates are desirous to continue the said road for the purpose of enabling them so to do:

SEC. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly:

That the said Theodorus Doty, Isaac Cook, Thomas Richmond, Robert Huginin, James Peck, James A. McDougall, Theophilus S. Morgan, Festus Clark, Thomas H. Campbell and Messrs. S. C. Hopkins & Co., and their assigns and personal representatives shall be, and for the term of fifty years from and after the passage of this act, shall continue to be a body corporate and politic, by the name of "The Chicago South Western Plank Road Company," and by that name shall have succession for the term of years above specified, may contract and be contracted with, may sue and be sued, complain and defend, in any court of law or equity; may make and use a common seal, and alter the same at pleasure, may make by-laws, rules and regulations for the management of its property, the regulation of its affairs, the appointment and number of its officers and agents, the negotiation and exeeution of its contracts. and for the transfer of its stock, not inconsistent with the laws of this state or the United States;

may take and receive conveyances of real estate, and hold and grant and convey the same at pleasure, provided, however, that they shall not, at any time, hold and own more real estate over and along the line of the road or roads of said company, than shall be of the value of twenty thousand dollars, and may make and receive all contracts and assurances as fully and completely as if the said corporation were a natural person.

SEC. 2. The said Chicago and Desplaines Plank Road Company, "its members, officers and trustees, may convey, transfer and set over to said corporation hereby created, the said road and the land over which the same passes, and all lands, premises, rights, benefits, interests, privileges and contracts belonging to said company, or held for their use and benefit, whether derived under and by virtue of said license or otherwise, whereupon the said incorporation shall have, hold, own and control for the sole use of said incorporation, all and singular, the said road, lands, premises, rights, benefits, interests, privileges and contracts, and may claim, hold and maintain the same in its own right, may establish toll-gates, and collect tolls on said road, subject to the rules and regulations hereinafter generally provided, and shall have the benefit of all the provisions herein contained, for the maintenance and protection thereof.

SEC. 3. The said corporation shall have the right to construct and, during its continuance, to maintain and continue an extension of said plank road, of such width as the directors of said incorporation may deem advisable, and upon the usual plan, commencing at the terminus of said road at the Desplaines River, and running westerly to the town of Aurora, in the county of Kane, and from thence westerly to a point on Rock River, in the discretion of the directors of said incorporation.

SEC. 4. The capital stock of said incorporation shall be $260,000, and shall be divided into shares of fifty dollars each.

SEC. 5. The affairs of said corporation shall be managed by a board of five directors, to be chosen annually by the stockholders; said stockholders shall be entitled to vote, at all elections and upon all questions in meetings of the stockholders, one vote for each share of stock upon which all assessments due have been paid. The directors shall appoint their own president, and provide for the time, place and mode of elections, and give due notice thereof. The present board of directors of the Chicago and Desplaines Plank Road Company, Thomas Richmond, Isaac Cook, James Peck, Theodorus Doty and James A. McDougall shall be the board of directors of said incorporation, until the stockholders can elect a board under this act. The directors of said corporation may make assessments and declare and pay dividends upon said stock, but no one assessment shall be for more than five per cent. and the assessment shall not be oftener than once in six days.

SEC. 6. As soon as the Chicago and Desplaines Plank Road Company, its members, officers and trustees have conveyed, transferred and set over to said corporation all and singular, the property, rights and interests of the said company, the said directors shall proceed or open the books of said incorporation whenever they shall assign, over their respective signatures, the stock of said corporation to the several members of the Chicago and Desplaines Plank Road Company in exact proportions to their respective shares and interest in the said roof at the time of making such assignment, and shall issue certificates at stock therefor. The said stock shall be transferable only on the books of said incorporation. As soon after the stock of said corporation shall have been assigned and certificates issued therefor as the stockholders in general meeting, may determine, they shall proceed to hold their first annual election of directors.

SEC. 7. The said corporation is authorized and shall have power to erect and maintain such toll-houses, toll-gates and other buildings for the accommodation and management of the said road, and the travel and transfer therein, as the said corporation may deem suitable to its interest; and may demand, collect and receive of and from any and every person using said road, or so much thereof as may be completed, toll to be regulated by the directors of said corporation, but not to exceed the following rates per mile: For every man and horse one cent per mile; for every carriage and wagon, drawn by horse or other animal, two cents per mile; for every carriage or wagon drawn by two horses or other animals, 2½ cents per mile; for every carriage or wagon drawn by four horses, or other animals, three cents per mile; for each additional pair of horses or other animals, ½ cent per mile; for horses or mules in droves, three mills per head, per mile; for cattle in droves, two mills per head, per mile; for hogs, goats or sheep, one mill per head, per mile.

SEC. 8. The said corporation shall cause to be kept upon each gate in some conspicuous place, a list of the tolls which may be lawfully demanded, and shall cause mile-posts to be erected and maintained on said Road. Any toll-gather is authorized to detain and stop any person going in said Road, until the toll properly chargeable shall have been paid.

SEC. 9. If any toll-gather shall unreasonably hinder or delay any traveler or passenger or shall demand more toll than by this Act is allowed, the Company shall forfeit and pay to the person injured, the sum of fifty dollars. If any person or persons shall wilfully cut down, break or deface or injure any mile-post or posts on said Road, or shall wilfully cut or throw down, break or injury any gate erected on said Road, or wilfully tear up, displace, break or injure in any way, the said Road, or anything thereunto belonging, he shall forfeit and pay to said corporation three times the amount of damages by him actually done, and in every

instance he shall forfeit and pay at least the sum of twenty-five dollars. If any person, to avoid the legal tolls chargeable on said Road shall turn off said Road and pass any gate on said Road, and again enter upon said Road, he shall forfeit and pay to said corporation the sum of ten dollars. If any person shall forcibly pass either of the gates on said Road without having paid, the legal toll, he shall forfeit and pay to said corporation, for every such offense, the sum of twenty-five dollars. All penalties and forfeitures incurred under this Act, may be recovered by action of debt in any Court having cognizance thereof, and where the penalty or forfeiture does not exceed the sum of one hundred dollars, the same may be prosecuted and recovered before any Justice of the Peace of the County where the offender or offenders may be found.

SEC. 10. The said corporation is hereby authorized to locate and construct said plank road over any lands owned by this state on the route of said road; and is authorized to acquire by voluntary cession or purchase from the owner, the right to construct said road over any land belonging to individuals, companies or corporations on said route; and in case said corporation cannot obtain the right to construct said road over the land owned by any individual, company or corporation, by voluntary cession, or by purchase, it shall be lawful for said corporation to appropriate and use so much of said land, as shall be necessary for the proper construction of said road, on complying with the six following sections.

SEC. 11. The directors may present a petition to the judge of any court of record, erected in any county in which said lands lie, to which said corporation is unable to acquire title, as aforesaid, setting forth, by some proper description, the lands which are wanted for the construction of said road or the appendages thereto, and the names of the owners thereof, if known, distinguishing with convenience, if it can be done, the parcel claimed in severalty by the respective owners, praying for the appointment of appraisers to assess the damages in which the owners of such land, severally sustain, by reason of the appropriation thereof by the said corporation, for the use aforesaid.

SEC. 12. On the presentation of said petition the said judge shall appoint a day for the hearing of the parties in interest, and shall direct such notice as he shall deem reasonable to be given, of the time and place of hearing: And in case it shall appear that any owner of any land is a feme covert, an infant or insane, or otherwise incompetent to take proper care of his or her interests, it shall be the duty of the said judge to appoint some discreet and reputable person, to act in the premises, in his or her behalf.

SEC. 13. At the time appointed for such hearing, the said

judge shall appoint three disinterested persons, freeholders, resident in the county in which said lands may lie, for the purpose of assessing the damages, and in the order in which they were appointed, shall direct and specify., what lands are proposed to be appropriated and occupied by said corporation for the purpose aforesaid.

SEC. 14. Said appraisers, after being duly sworn, before some officer authorized to administer oaths honestly and impartially to assess such damages, shall proceed by viewing said land, and by such other evidence as the parties may produce before them, to ascertain and assess the damages which each owner will sustain by the appropriation of his or her land, for the use or accommodation of said plank road, or its appendages.

SEC. 15. The said appraisers shall make report to said judge in writing under their hand, reciting the order of their appointment, and specifying the several parcels of land described therein, with all necessary certainty the names of the owners of the respective parcels, if known, and if not known, stating that fact, and specifying also, the damages which the owner of the respective parcels will sustain, by reason of the appropriation of the same for the purpose aforesaid, and in case either of the parties are dissatisfied with the assessment, the said judge may on the hearing of the parties in (interest, modify this assessment as to him shall appear) just.

SEC. 16. On the paym·nt of the damages, thus assessed, together with the expenses of the assessment of the same shall be settled by said judge, or on depositing the amount thereof, for the use of such owners in such place as the said judge shall direct, the said corporation shall immediately become entitled to the use of said lands, for the purposes aforesaid,and the report of said appraisers with the the order of the said judge, modifying the same, if the same shall have been modified, shall be recorded in the office of the recorder of the county in which said lands shall be situated; in the same manner and with the like effect as deeds are recorded without any other proof than the certificate of said judge that the report is genuine, and when said report and order shall have been recorded as aforesaid, the said corporation shall be seized and possessed of said land or real estate, and may enter upon and take possession, and use of the same for the purpose hereinbefore recited; provided, that said road shall not be run through any door, yard or orchard, or so as to disturb any building, without the consent of the owner or owners thereof.

SEC. 17. The said corporation for the convenience of travel may construct and establish lateral branches of the said plank road, in the discretion of said corporation, upon the same plan with the main road, and to the construction, establishment and maintenance of said branches and the gates and tolls thereon, all the provisions of this act shall fully apply.

SEC. 18. The said corporation, in and about the prosecution of the said road, and to aid it therein, may borrow money and contract to pay therefor a rate of interest not to exceed twelve per cent. Should the directors of said corporation consider it necessary, they may provide and set apart a certain per cent. of the net profits of said road and branches, as a special fund for the prosecution, repair and removal of the said road, without the same being decided by the stockholders in a general meeting; the said special fund, so set apart, may be loaned from time to time by the directors of said company, upon good and sufficient security, they making such loans upon such time that the money loaned may be re-collected whenever needed, for the purposes of renewing the said road.

SEC. 19. This act is hereby declared a public act, and shall have effect from and after its passage.

Z. CASEY,
Speaker of the House.
WILLIAM MCMURTRY,
Speaker of the Senate.

Approved February 10th, 1849.
AUG. C. FRENCH.

Act of February 12, 1849,

Of which three sections fraudulently annexed are printed in the bill as the charter of the Northwestern Plank Road Company.

The bill next alleges that by the 21st, 22d and 23d sections of "An Act to construct a plank road from Oswego, in Kendall county, to the Indiana state line by way of Joliet, in Will county," it was enacted and provided as follows:

As the act referred to was by the 20th section made a public act, we will quote the whole of it: *First.* That it may appear in the clearest manner that this Northwestern Plank Road Company was nurtured in fraud upon the constitution, and stolen through the legislature by criminal practices. *Second.* The two complete charters given will afford convenient examples of the way a plank road charter should be written out, if it is to be read three times in each house, is to be certified by the speakers of both houses, and *presented* to the governor.

(Private Laws of 1849, p. 57.)

AN ACT TO CONSTRUCT A PLANK ROAD FROM OSWEGO, IN KENDAL COUNTY, TO THE INDIANA LINE, BY THE WAY OF JOLIET, WILL COUNTY.

SEC. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that all such persons as shall become stockholders agreeable to the provisions of this act in the corporation hereby created, shall be and continue to be a body corporate and politic under the name of "The Oswego and Indiania Plank Road Company," and by that name shall have succession forever, may sue and be sued, complain and defend in any court of law or equity in this state; may make and use a common seal, and alter the same at pleasure, may make by-laws, rules and regulations, for the appointment of officers and their number and for the transfer of its stock, for the management of its property, and for the better regulating and controlling said company, not inconsistent with the laws and constitution of the United States or of this state, may appoint subordinate officers, and require of them and their agents such security as may be deemed necessary under the said restrictions, to carry out and sustain said corporation in the exercise of its powers.

SEC. 2. Said corporation shall have power and the right to construct, and during its continuance to maintain a plank road of such width as may be deemed advisable by the directors of said company, and upon the usual and best mode of constructing the same, with such appendages as may be deemed necessary for the convenient use of the same from Oswego, in Ken-

dal county, by the best and most direct route by way of Plainfield and Joliet in Will county, to such point on the line of the State of Indiana, as shall be determined by the directors of said company as most favorable to the interests of the same, with the right to construct branch roads from such proper and convenient points as in the judgment of the said directors shall best promote the interests of the said company.

SEC. 3. The capital of the said company shall be one hundred thousand dollars, which shall be considered personal property, and divided into shares of one hundred dollars each.

SEC. 4. That John W. Chapman, George W. Bradley, Garion, D. A. Parks, Uri Osgood and Hamilton D. Risley, or a majoirty of them shall be commissioners for receiving such subscriptions to the capital stock of said company, who shall by notices in a public newspaper or papers in Will county, and also by affixing notices in three of the most public places on the line of said road, and also three notices in the town of Oswego, and three in the town of Lockport, setting forth when and where the books will be opened for receiving subscriptions to the capital stock of said corporation at least thirty days before the opening of said books. The books shall be opened at least one day in Joliet, one day in Lockport, one day in Plainfield and one day in Oswego, as shall be designated by said notices.

SEC. 5. The said commissioners may solicit and receive subscriptions from time to time at their pleasure after opening said books at their different places designated, until they shall have subscriptions of shares of said stock to the amount of twenty thousand dollars; when this amount shall be subscribed, the said commissioners shall notify the said subscribers by a written or printed notice left at the place of residence of each subscriber, setting forth that the amount of twenty thousand dollars of the stock of said company has been subscribed and that he is notified to attend (at a day and place fixed in said notice at least thirty days from the time of giving said notice) to elect five directors by a majority of subscribers, to be styled a Board of Directors to manage the affairs of the Oswego and Indiana Plank Road Company, a majority of whom shall form a quorum to do business.

SEC. 6. When any subscription to the capital stock of said company is made, it shall be the duty of the said commissioners receiving the same to have printed blank notes in readiness for the subscribers to said stock to sign, which said notes shall read as follows: "I, A. B. (as the case may be) in consideration of the effort now making to construct a Plank road from Oswego, Kendall county to the Indiana state line by way of Joliet, do hereby agree to pay the sum of.....to the treasurer of the Oswego and Indiana Plank Road Company, ten per cent. of which I agree to pay forty days after there has been twenty

thousand dollars of the capital stock of said Oswego and Indiana Plank Road Company subscribed and thereafter ten per cent. of the whole sum above mentioned each three months, until the amount is fully paid. In default of any of the above payments after I have been notified of such payments having become due as above, the treasurer of said company is hereby authorized and empowered to confess a judgment for me and in my name in any court having jurisdiction which may and shall be as effectual and as good in law against me and my property as if I confessed the same in my own proper person. Given under my hand and seal, this .....day of....A. D. 184 .

L. S.

SEC. 7. In all cases where there is a default in the payment of stock notes as above, the affidavit of the treasurer of said company that the pay was due according to the provisions of such stock note presented for judgment, shall be sufficient evidence to allow the confession of judgment on said note, against the maker thereof.

SEC. 8. Immediately after the election of directors and the organization or said board, the commissioners shall deliver to said directors of their treasurer, the whole amount of money and notes received by them in subscription to said stock.

SEC. 9. The said corporation is authorized, as soon as the board of directors are elected as aforesaid, to commence the construction of said road, and as soon as any three miles of said road are completed, said corporation may erect gates thereon and collect the tolls allowed by this act. And it shall be the duty of the said corporation, when said road shall have been completed and gates erected thereon, to keep it in good order and repair, and whenever the said road, from any cause, shall have been injured, the said corporation shall immediately proceed to repair the same. The said corporation shall have power to borrow money at a rate not to exceed twelve per cent. per annum for any time to suit the convenience of said company.

SEC 10. The said corporation shall have power to fix and regulate the toll to be charged and paid for traveling and passing on said road; the rates so fixed shall be printed and posted up at each toll-gate, and it shall be lawful for any toll-gatherer to stop and detain any person going on said road until the toll properly chargeable shall have been paid, and the tolls collectible from those passing along a portion of the line of said road less than half the length of said road, shall be charged only half the regular toll as fixed by said company and posted up in said toll-gate houses.

SEC. 11. There shall be mile-posts erected on said road, and if any person shall cut down, deface, tear up, or in any other way injure said mile-posts or injure the road by any means whatever, except by natural wear, he or she so injuring said road

shall pay to said company three times the cost of such injury, to be collected before any court having jurisdiction.

SEC. 12. The said corporation is hereby authorized to locate and construct said Plank Road over any lands owned by this State, free of charge, or by individuals on the route of said road; provided said company shall not take land to exceed eighty feet in width on said route, and is authorized to acquire by voluntary cession or purchase from the owners, the right to construct said road over the land of any individual or corporation or company on said route, and in case said company cannot obtain the right to construct said road over the lands owned by individuals or corporations or company by voluntary cession or purchase, it shall be lawful for said company to appropriate and use so much of said land as shall be necessary for the proper construction of said road, on complying with the following conditions.

SEC. 13. The directors of said road may present a petition to the Judge of any court of record in any county in which such lands may be, to which such corporation is unable to acquire title as aforesaid, setting forth by some proper description the land wanted for the construction of said road and the appendages thereto and the names of the owners thereof, if known, distinguishing with convenience, if can be done, the parcels, claims in generalty, by the respective owners, and praying for the appointment of appraisers to assess the damage the owners of said land will generally sustain by reason of the appropriation thereof by the said corporation for the use aforesaid.

SEC. 14. The said Judge on receiving the said petition from the directors of said corporation, shall proceed to appoint three discreet, disinterested freeholders, who shall be sworn by said judge to take into consideration all the advantages and disadvantages of said line sought to be crossed by the said road, and if the advantages are considered to be equal to the disadvantages there shall be nothing allowed, but if it shall be considered that the disadvantages of said road are greater than the advantages, then the said appraisers shall make such reasonable award of damages as they may think the owner thereof has sustained.

SEC. 15. That when the appraisers aforesaid have made a full and entire appraisement of such lands petitioned to be appraised, they shall, within ten days, make a full report of such appraisement to the judge of said court, who, on receiving the same, shall make a decree that a judgment shall be entered of record by the clerk of said court against the said company, for the benefit and in favor of those to whom damages are awarded, and when such judgment shall be fully paid they shall have all the rights and privileges that they could have, had the right of way been ceded to the company, and also the said judge shall decree that all such lands as were not considered by said appraisers to be damaged by said road passing through, to be free to said company.

SEC. 16. The clerk of said court, on entering up the decrees of said court as aforesaid, shall make out a full certificate, under the seal of the court, setting forth the fact that the said company have, under the decree of said court, obtained the full right of way, mentioning fully the right of way granted.

SEC. 17. Whenever the said company have more means on hand than they need for immediate use, they may loan the same to individuals on real estate, pledge of property or personal security; provided the said company shall not charge more than twelve per cent. per annum upon such loan.

SEC. 18. Should the said commissioners, mentioned in this act, fail to obtain subscriptions to the full amount of the capital stock of said company, those persons who do subscribe may pay their money in, and at any time they may agree, proceed to elect directors of said company, and also to do all things necessary to carry every section of this act into operation, said company may construct a railroad in place of a plank road on the whole line of said road, or any part thereof, if they wish so to do, under the provisions of this act.

SEC. 19. Any five persons in the State of Illinois may organize under the provisions of this act, so far as the same would be applicable, and build or construct a plank road from Elgin, in Kane county, on the most eligible route in Kane county, and also any other five persons may organize, under the provisions of this act, and build a plank road from Batavia, Kane county, to intersect the plank road from Elgin, Kane county, to Chicago, (this law so far as can be applicable shall apply to this road; either of said roads having the right to continue to Chicago, in case the other is not built) on the most eligible route. The same rules for acquiring right of way, and all provisions of this act, so far as applicable in reference to organization, government, and every other matter or thing, shall apply to and govern the company under this section. This act also to have full force in reference to its funds in all respects. Those persons who organize under this act to build the said road, shall have all the benefits arising under the above, the same as if this act had been made purposely, for the construction of this road.

SEC. 20. *This act shall be a public act, and all courts of law or equity, and also the legislature and executive officers of this state shall liberally construe the same.*

SEC. 21. That John Gray, Joseph Filkins, Thomas Richmond, and their associates to whom was granted by the County Commissioners of Cook county, a license to construct a plank road from the city of Chicago to Oak Ridge, and from thence to Wheeling, and to the north line of said county, be, and they are hereby constituted a body corporate and politic, under the

name and style of "*The North Western Plank Road Company*," and by that name shall have perpetual succession and the right to sue and be sued, together with all other rights and ordinary powers of a corporate body.

SEC. 22. That the said North Western Plank Road Company shall have, possess and enjoy and be subject to all the powers, privileges, rights and duties contained in sections four, seven, eight, nine, ten, eleven, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen and nineteen, of the act passed at the present session of the general assembly, entitled "An Act to Incorporate the Chicago, South Western Plank Road Company," and in addition thereto shall have the right to take and use for the purposes of constructing said road, any road or public highway along the line of the contemplated plank road, upon obtaining the order of the county commissioners, court of said county, to be entered of record, consenting to the appropriation of such road or highway, which said order shall be made by said court upon the petition of three-fourths of the owners of the land, lying along or contiguous to said highway, which order when obtained, in manner aforesaid, shall vest the right to use said highway for the purposes of said plank road, as fully and completely as though said corporation had obtained the same by grant.

SEC. 23. This act shall take effect from and after its passage.

Z. CASEY,
Speaker of the House of Rep.
WILLIAM MCMURTRY,
Speaker of the Senate.

Approved Feby. 12th, 1849.
A. C. FRENCH.

THE ACTUAL CHARTER.

ACT OF MARCH 1, 1854.

AN ACT TO INCORPORATE THE NORTH WESTERN PLANK ROAD COMPANY.

WHEREAS, an act was passed by the legislature of the State of Illinois, approved February 12, 1849, entitled: "An act to construct a plank road from Oswego, in Kendall county, to the Indiana state line, by way of Joliet, in Will county," and, whereas, the 21st, 23d and 23d sections of said act constituted John Gray, Joseph Filkins, Thomas Richmond and their associates, a body politic and corporate, under the name and style of the North-Western Plank Road Company. And, whereas, doubts exist whether this is in accordance with the constitution of this state, inasmuch as the title of the act of which this is a part, does not set forth this part of the act, nor the title of the company which is authorized under the name and style of the North Western Plank Road Company; therefore:

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly: That John Gray, Joseph Filkins, Thomas Richmond and their associates, to whom was granted, by the county commissioners of Cook county a license to construct a plank road from the city of Chicago to Oak Ridge, and from thence to Wheeling, and to north line of said county, be, and they hereby are, constituted a body corporate and politic, under the name and style of the North Western Plank Road Company, and by that name shall have perpetual succession and the right to sue and be sued, together with all other rights and ordinary powers of a corporate body.

SEC. 2. That the said North Western Plank Road Company shall have, possess and enjoy, and be subject to all the powers, privileges, rights and duties contained in sections four, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen and nineteen of the act passed at the session of the General Assembly, approved February 12, 1849, entitled, "A nact to incorporate the Chicago South Western Plank Road Company," and in addition thereto shall have the right to take and use for the purpose of constructing said road any road or public highway along the line of the contemplated road, upon obtaining the order of the county commissioners' court of the said county, to be entered of record, consenting to the appropriation of such road or highway, which said order shall be made by said court upon the petition of three-fourths of the owners of the land lying along or contiguous to said highway, which order, when obtained in the manner aforesaid, shall vest the right to use said highway for the purposes of said plank road, as fully and completely as though the said corporation had obtained the same by grant.

SEC. 3. That whereas the corporators heretofore named did organize and proceed to prosecute the construction of such road under the powers referred to, all the acts of said corporators, done in accordance with the rights and provisions therein contained, in good faith, are hereby legalized and made valid the same as if no defect in the title of the original act had existed.

This act shall take effect from the date of its passage.

JOHN REYNOLDS,
Speaker of the House of Representatives.
G. KOERNER,
Speaker of Senate.

Approved, March 1st, 1854.
J. A. MATTESON.

ACT OF FEBRUARY 15, 1865.

AN ACT TO AMEND THE CHARTER OF THE NORTHWESTERN PLANK ROAD COMPANY, IN THE COUNTY OF COOK, AND TO AUTHORIZE THE SALE OF THE FRANCHISE.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly:

That the North Western Plank Road Company be authorized to substitute stone or gravel in place of plank, upon said road or any part thereof.

Provided the same shall be of equal width of the plank track, and be constructed so as to pass the examination of the inspectors of plank roads in said county.

SEC. 2. The said company may collect the same tolls and enjoy the same privileges granted to plank road companies by the general plank road law, and it may collect the same penalties, fines and damages for any violation of its rights or damage to its property, that is authorized by said general law, and be subject to the same penalties that law imposes for abuse of travelers or the community.

SEC. 3. The president, by the advice and direction of a majority of the stockholders, may sell to the County of Cook, the franchise, the property and immunities of said company or to any other party or parties, and thus dissolve said company and divide the avails amongst the stockholders.

SEC. 4. And be it further enacted, that the board of supervisors of Cook County may purchase such franchise property and immunities and upon the order of said board, the clerk of said county shall proceed to purchase and receive the deed of title to the same, and should said county fail to purehase the same, any person or persons may purchase the same, and thereby make the same private property.

SEC. 5. The deed of the president of said company, to the said County of Cook, or to any other party purchasing, shall be a good and lawful title to the same, provided always, that all the debts and liabilities of said company shall be paid. Provided further, that the purchaser or purchasers of said franchise and road shall be bound by all the obligations said North Western Plank Road Company is by its charter, and shall enjoy all the rights and privileges enjoyed by said company, and no more.

ALLEN C. FULLER,
Speaker of House of Representatives.
WM. BROSS,
Speaker of the Senate.

Approved Feb. 15th, 1865.
RICHARD J. OGLESBY.

Office Supreme Court U. S.
FILED.
DEC 9 1893
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1893.

NO. ~~1250.~~ 1259

MARY P. MILLER, DEVISEE OF JASON G. MILLER, DECEASED,
Plaintiff in Error,

vs.

DOMINIC G. COURTNAY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

WALTER J. LAMB,
A. C. RICKETTS,
HENRY H. WILSON,
Counsel for Plaintiff in Error.

LINCOLN PAPER HOUSE, LINCOLN, NEB.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 1250.

MARY P. MILLER, Devisee of Jason G. Miller, Deceased,
Plaintiff in Error,
vs.
DOMINIC G. COURTNAY,
Defendant in Error.

Error to the Circuit Court of the United States for the District of Nebraska.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The action is ejectment to recover the possession by the plaintiff as alleged owner of that portion of the southwest quarter of the northwest quarter of the northeast quarter, section 25, township 10, range 6, east of the 6th P. M., in Lancaster county, Nebraska, which lies north of the north line of a continuation of M street, as the same is located through the city of Lincoln, Nebraska. The property appears on the map of Avondale addition to the city of Lincoln at page 45 of the record as all of blocks 1 and 2, and that part of 21st street, which lies between them except forty feet off the south end next M street, also to recover the possession

for a public street of a strip of land, commencing fifty feet east of the southeast corner of block 19, of Lavender's addition to Lincoln, thence extending east to the east line of the southwest quarter, of the northwest quarter of the northeast quarter, section 25–10–6, thence south 100 feet thence west to a point fifty feet east of the northeast corner of block 12, of Lavender's addition, thence north 100 feet to the place of beginning. This strip may be seen as an extension of the street on map at page 44 of record, and would include M street as shown on the map of Avondale addition at page 45 of record, and forty feet off the south end of blocks 1 and 2 of that addition. M street in the city of Lincoln proper is 100 feet wide, while through Avondale addition it is only sixty feet wide.

Defendant pleads general denial, title in Martha I. Courtnay, his wife, adverse possession, title through judicial sale, and sheriff's deed. The issues were tried to a jury, which returned a verdict of special findings but no general verdict. On this verdict the circuit court entered judgment for defendant on his motion as upon general verdict.

ASSIGNMENTS OF ERROR.

It was error for the circuit court to enter judgment for the defendant on the special verdict of the jury, for the reason that the findings of the jury do not support the judgment.

The circuit court erred in sustaining defendant's motion for judgment on the findings of the jury for the reason that the findings of the jury do not support the judgment entered and are consistent only with a judgment for the plaintiff.

It was error in the circuit court to enter a judgment as if upon a general verdict for the defendant when the only finding of the jury was a special verdict, which does not support a judgment for defendant, but would support a judgment for plaintiff.

ARGUMENT.

Lavender was the owner of the property in controversy on the 21st day of February, 1883, and his deeds of that date transferred his title to Jason G. Miller.

At pages 9 to 12 inclusive of the record, the jury find that the title to the property in question passed from the government of the United States by mesne conveyances to one Luke Lavender. At pages 12 to 15 inclusive of the record, the jury find that Luke Lavender and wife made, executed, and delivered to Jason G. Miller, two quit-claim deeds, copies of which are made part of the findings, the first purporting to convey one of the strips of land in controversy for an alleged street. The second purports to convey an unconditional fee to the other strip.

The clause containing the grant is the same in both of these deeds, and runs as follows: "Have remised, released, and quit-claimed, and by these presents, do for themselves, their heirs, executors, and administrators remise, release, and forever quit-claim and convey unto the said party of the second part and to his heirs and assigns forever all their right, title, interest, estate, claim, and demand, both at law and in equity," etc.

The word "convey," and the words "right, title, inter-

est, estate, claim, and demand, both at law and in equity," made the granting clause more comprehensive than that of the ordinary quit-claim deed, or deed of release, in that on its face it purports to convey every equitable and legal right held by Lavender in this land at the time of making these deeds.

We are not left to the authorities as to what interest these deeds convey. It is made explicit on the face of the deeds: that is, if Lavender's interest in this land was less than a fee or a clouded legal title or an equitable title which required the assistance of a court of equity to restore the legal title, or if his title to this land was buried under a fraudulent and voidable execution sale, and sheriff's deed, which could be uncovered and set aside only by a court of equity, in either case the deeds expressly convey that right or title to Jason G. Miller. This would be true though the granting clause of the deed was less comprehensive. In Hamilton vs. Doolittle *et al.*, 37 Ill., 472, where the granting clause was followed by the limitation. "This deed is intended to convey all the interest the said Peter Menard has in the town of Pekin, now city in said county." Prior to the execution of this deed the grantor had executed and delivered a warranty deed of the same property, which was defective in the acknowledgement and was not recorded until after the quit-claim deed. The court says, "The question then presents itself whether Menard's insufficiently executed deed is embraced in the reservation. By fair construction the language must be restricted to previous conveyances legally executed and operative as such. A conveyance void under the law, or even voidable

at the time of executing the subsequent conveyance could not be held to be embraced within the reservation."

Brown vs. Jackson, 3 Wheat., 449.

Upon the effect of a quit-claim deed the supreme court of Michigan use the following pertinent language in Clark vs. Hall, 19 Mich., 356, "A furthur objection arises upon the conveyance made of the land by Conant: It appears that he conveyed to one Russell before he received patent. The conveyance was by quit-claim, and defendant claims that as Conant had no legal title at the time his deed conveyed none, and the title he subsequently acquired by the patent did not inure to the benefit of Russell, inasmuch as there were no covenants in his deed to transfer the title by way of estoppel. The general principle unquestionably is that a government patent relates back to the original entry and perfects and makes valid any attempted transfer by the patentee intermediate the entry and the patent." This principle is not disputed but it is denied that it can apply to a case where the patent issues not to the original purchaser but to his assignee. * * * The same reasons for the applicability of the doctrine exist in this case as in any other and no reason either substantial or technical appears to prevent it.

Doe vs. Reed, 4 Scam. (Ill.), 117.
Butterfield vs. Smith, 11 Ill., 485.

Sections 4370, 4375, and 4378, of chapter 47, Consolidated Statutes of Nebraska, bear upon this point and are in the following words and figures.

"4370. The term deed as used in this chapter shall be

construed to embrace every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and leases for one year or for a less time.

"4375. Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary interest can be reasonably inferred from the terms used.

"378. In the construction of every instrument creating or conveying or authorizing or requiring the creation or conveyance of any real estate or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

From the deeds themselves, the authorities cited, and the statutes quoted, it is made clear that Miller took all of Lavender's title.

This conclusion is equally true of the strip of land covered by the first deed, the use of which is limited in the deed as follows: "To be used as a continuation and extention of M street.". Because this deed conveyed the fee, the limitations only restrict the use of the land to that of a public street. This is a condition subsequent which might defeat the title if in the future the grantee should appropriate the land to different uses than that limited.

Vail vs. Long Island R. Co., 106 N. Y., 283.

At common law, the deeds from Lavender to Jason G.

Miller would have been inoperative to transfer the title if the property was at that time in the adverse possession of another. This rule of the common law has been changed by statute in the state of Nebraska, and a person may convey whatever interest he has in real estate although it is in the adverse possession of a third party.

The following is a true copy of section 4355, Consolidated Statutes of Nebraska:

"No grant or conveyance of lands or interest therein shall be void for the reason that at the time of the execution thereof such lands shall be in the actual possession of another claiming adversely."

The findings of the jury do not sustain the alleged title in or through Martha I. Courtnay. The execution sale on which it was based was fraudulent and void and was nullified by the decree of the court.

Two sets of facts are found which bear upon the title to the controverted property. The first relates to defendant's alleged title through execution sale, and the second to adverse possession. These are here discussed in their order.

The facts found relative to the execution sale of this property prior to the deeds to Miller may be summarized from the sheriff's deed. Record, 42 to 44 inclusive. From this it appears that Henry Atkins recovered a judgment against Lavender, November 4, 1873, for $2,083. That on January 2, 1879, an execution was issued on this judgment—levied on Lavender's property including the controverted property. On March 22, 1879, the sheriff sold the property levied upon to Martha I. Courtnay. This

sale was confirmed in May, 1880, and a deed made April 27, 1881. The jury further find that this sale was attacked by legal proceedings for fraud and the issues joined, and the decree entered therein are made part of the findings. Record, pages 16 to 37 inclusive.

The case was entitled Luke Lavender vs. Henry Atkins, Martha I. and D. G. Courtnay. On November 5, 1885, the court in that case entered its decree from which we quote the following, record 35: "And thereupon finds * * in favor of the plaintiff as to those lands described as the southwest quarter of the northwest quarter of the northeast quarter of section 25, township 10 north, of range 6 east in Lancaster county, Nebraska, and that the plaintiff is entitled to redeem the same and to be restored to the possession thereof upon the payment within six months next ensuing of the sum of $234 with interest thereon at the rate of seven per centum per annum from March 22, 1879, until the same is paid into court for said defendant. * * It is therefore ordered, adjudged, and decreed that upon the payment by the plaintiff of said sum into court for the defendants within the time aforesaid the sheriff's sale of March 22, 1879, and deed to said lands * * be set aside, annulled, and held for naught, and the title to said lands be quieted in the plaintiff as against all claims or title that said defendants or either of them, and all persons holding or claiming to hold under them or either of them, may have or claim to have under and by virtue of said sale and deed. * * and that plaintiff have possession of said lands and execution therefor."

By this decree the cloud cast upon Lavender's legal title

to the controverted property by the execution sale was wholly removed, leaving the title of the ten acres subject only to a lien of $234 with seven per cent interest from March 22, 1879.

It is contended that by paragraph 6, record 40, the jury find that neither Luke Lavender nor yet any one for him ever paid the $234, and therefore the decree is inoperative. This may be true in letter but not in fact, as the jury's findings show.

The defendants in that suit immediately set out to purchase Lavender's title to a large amount of property, including that now in controversy. On December 18, 1885, they entered into the following contract:

"In the district court of Lancaster county, Nebraska:

"Luke Lavender vs. Henry Atkins, Martha I. Courtnay, and D. G. Courtnay.

"This cause is settled, and the judgment and decree rendered in the district court of Lancaster county is in all things affirmed, and all errors are waived by the plaintiff, and the said plaintiff waives that part of the decree in this case which gives said plaintiff the right to redeem certain parts of said premises, mentioned in said decree, and the said Luke Lavender and wife deed all of said premises mentioned in the said decree to D. G. Courtnay, and defendant's herein agree to pay all costs, and judgment is rendered for the same in favor of plaintiff.

"D. G. COURTNAY.
"*Attorney for Defendant.*
"LUKE LAVENDER."

On the same day and date Lavender and wife conveyed by deed of general warranty all property then in controversy, including that now in controversy, to D. G. Courtnay as found by the jury. Record, pages 40 and 41. The jury further finds, record, page 39, that Henry Atkins, Martha I. Courtnay, D. G. (Dominic G.) Courtnay paid Lavender for this contract and deed, in addition to the $234, made a lien on the ten acres, of which the controverted property forms less than one-third, the sum of $500 cash and $14,000 in judgments held against Lavender.

It was not necessary in that transaction that Lavender should have first paid the $234, and then his adversaries repaid it to him, in order to have had the effect of payment. The law takes cognizance of and gives effect to the real transaction had, the substance of things done, whether certain words are formally uttered or certain moneys are formally counted or not. It cannot be controverted that the $234 was as effectually paid by Lavender in this transaction as if he had formally counted out the money and paid it with formal statement of the purpose. To say otherwise is to quibble on words and phrases.

Nor is the nature of this settlement and conveyance by Lavender to D. G. Courtnay in any wise affected by the fact that the contract quoted was filed in the court where the decree was entered, and that on the 28th day of December, 1885, it was made the basis of a modification of the decree theretofore entered, record, page 38, for the reason that the modification was wholly based upon a new contract between the parties to the suit, whereby the one had purchased and the other sold the property awarded in the decree, and this

modification was a part of that settlement and purchase, and on its face purports to be.

If Lavender himself could not destroy and nullify the title he had conveyed to Miller, he could not authorize the court to do it, for the court in that was merely his agent—it acted and purported to act on his express authority in the contract and was not and did not claim or pretend to modify its decree on a reconsideration of any law or facts theretofore existing between the parties.

There is therefore but one conclusion to these several findings, and that is that, while Lavender's title to the controverted property was clouded by the fraudulent execution sale, that cloud was removed by the decree. The decree was not the result of any new title in Lavender, acquired after his conveyance to Jason G. Miller, nor did the decree itself constitute an after-acquired title, but it was the preservation in Lavender of the title he already had as against an attempt to divest him of the title through a fraudulent execution sale, and it operated only to remove the cloud cast upon it by the fraudulent execution sale.

Therefore the title of Lavender to the controverted property did not pass to Martha I. Courtnay by the execution sale and through her to the defendant.

The acceptance by the defendant from Luke Lavender of a warranty deed, of the ten acres of which the land in controversy forms a part, on December 18, 1885, was an explicit admission that Lavender then had the legal title to the property, and the defendant not only so thought but se-

cured and took to himself Lavender's covenants to that effect.

The circuit court's judgment therefore cannot be bottomed on the alleged execution sale.

The findings of the jury fail to establish title to the property in controversy in the defendant or his grantors by adverse possession, or that the plaintiff's right of action had been barred by the statute of limitations.

The only finding of the jury on which the defendant relies to support the issue of limitations, is paragraph 7, record, page 40, which runs as follows:

"We, the jury, further find and say that Henry Atkins and his grantees have had open, notorious, continuous, and visible possession of all of said premises described in plaintiff's petition from April 1, 1876, to the time of the commencement of this action. Yes."

Section 4542, of title 2, Consolidated Statutes of Nebraska, reads as follows:

"4542. An action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages."

The possession found by the jury originated in April, 1876. The deeds to Miller bear date February 21, 1883. They were executed by Lavender. Therefore, from April, 1876, to February, 1883, the defendant and his grantors must

have held possession hostile to the title of Luke Lavender in order that it shall be taken into account in making up the ten years necessary to a statutory bar. The record shows that plaintiff's action was commenced February 21, 1887; and that defendant and his grantors must have held hostile to all claimants of this land as early as February 21, 1887, to make this defense a bar. Do the jury so find? We think not. The statute will begin to run only when the possession becomes adverse. The presumption of law is that the possession is by the consent and permission of the owner of the fee and not hostile to it. Baldwin, justice, says in U. S. vs. Arredondo, 6 Peters., 743. "The law decrees every man to be in the legal seizin and possession of land to which he has a perfect and complete title: this seizin and possession is coextensive with his right and continues till he is ousted thereof by an actual adverse possession. This is a settled principle of the common law recognized and adopted by this court."

Clarke's Lessee vs. Courtnay, 5 Peters., 354.

In Jackson et al. vs. Berner, 48 Ill., 203, the court says, "This court has said in several cases that adverse possession sufficient to defeat the legal title must be hostile in its inception, and continue hostile uninterruptedly for twenty years."

In McClellan vs. Kellogg, 17 Ill., 498, the court says, "But the doctrine of adverse possession is to be taken strictly and is not to be made out by inference, but by clear and positive proof."

The supreme court of New Jersey says, Cornelius et al.

vs. Giberson, 25 N. J. L., 31. "It is a settled rule that the doctrine of adverse possession is to be taken strictly; it is not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner."

Jackson vs. Sharp, 9 John. (N. Y.), 167.
Jackson vs. Waters, 12 John. (N. Y.), 365.
Proprietors, etc., vs. Springer, 4 Mass., 418.
Townsend vs. Reeves, 44 N. J. L., 529.
Kirk vs. Smith, 9 Wheaton, 288.

Where parties take possession without color or claim of title such possession is subservient to the owner of the fee.

Harvey vs. Tyler, 2 Wall., 329.

In order to constitute a bar the supreme court of Nebraska says in Weeping Water vs. Reed, 21 Neb., 271, "It must have been continuous, adverse, hostile, and exclusive during the ten years next preceding the commencement of the suit."

The findings of the jury on this question will not therefore be aided by any legal presumption. If the findings are not sufficiently comprehensive to constitute adverse possession, this defense must fail, and to base a judgment thereon would be error. The language of the jury is "had open, notorious, continuous, and visible possession." This is entirely consistent with the fee in Lavender and his grantee Miller. No such apt words as hostile, adverse, under claim or color of title appear anywhere in the finding. This possession is entirely consistent with a leasehold from Laven-

der or from Miller. The presumption being with the plaintiff, this finding is wholly insufficient to start the statutes of limitation to running, and the finding falls far short of supporting the defense of statutory bar. It is true that the jury further find that the defendant and his grantors have paid the taxes on the land since 1876. Mere payment of taxes will not constitute adverse possession. Nor is occupancy with payment of taxes alone sufficient to constitute adverse possession. It is consistent with the possession being subordinate to the fee. We shall also see that at least up to March 22, 1879, the defendant and his grantors not only did not claim hostile to Lavender, but on the contrary did that which was consistent only with title in Lavender.

In fact the defendant claims title through another source which is inconsistent with adverse possession, which alleged title is based on a sheriff's deed, a part of the jury's finding, record, page 42. All the findings must be construed together. The findings of the jury, record, pages 39 and 42, show that Henry Atkins owned a judgment against Lavender January 2, 1879, and on that date caused an execution to be issued out of the office of the clerk of the district court for Lancaster county, Nebraska, on that judgment and levied upon the land in controversy as the property of Luke Lavender, and on the 22d day of March, 1879, caused said property to be sold under said execution to satisfy the debt of Lavender, and that Martha I. Courtnay became the purchaser at that sale of the property in controversy.

Our contention is that whatever may have been the char-

acter of the possession of Henry Atkins from April, 1876, to January 2, 1879, the possession then ceased to be hostile or adverse to Lavender because Atkins then made express recognition of Lavender's title.

When Atkins caused an execution to be levied upon that property as Lavender's to satisfy a judgment he held against him, and caused the property to be advertised and sold as Lavender's property, he did that which was inconsistent with a claim of title in himself and which was a conclusive recognition of title in Lavender. A recognition by one in possession of property of title in the owner of the fee will interrupt the running of the statute, and the possession therefore held cannot be used to make up any part of the period necessary to a statutory bar.

Horton vs. Davidson, 135 Pa. St., 186.
Bosworth vs. City, 13 S. W. Rep. (Ky.), 920.
Davies vs. Collins, 43 Fed., 31.
Hull vs. C., B. & Q. R. R. Co., 21 Neb., 386.
Jackson vs. Cuerdon, 2 John., Ch. 353.
Jackson vs. Spear, 12 Wend., 401.
Erskine vs. North, 14 Gratt., 60.
Walbruner vs. Ballen, 68 Mo., 164.
Wood on Limitations, 578.
Lovell vs. Frost, 44 Cal., 471.
Dietrick vs. Noel, 42 O. S., 18.
Stump vs. Henry, 6 Md., 201.
Kouns vs. Steel, 19 Pa. St., 203.

If our contention is well taken then the findings of the jury do not warrant a judgment in favor of the defendant

based on the statute of limitations, and to do so would be error.

The judgment for the defendant must stand, if at all, on the findings of execution sale and sheriff's deed or on adverse possession. We have endeavored to show that neither set of these findings would warrant the judgment. How well we have succeeded the court must determine.

It is not necessary to discuss the conveyance found to have been made by Lavender and wife to the defendant dated December 18, 1885, record, pages 40 and 41, further than that it constitutes a clear, and it would seem conclusive concession that the defendant was not prior thereto the owner of the property. The receipt of a warranty deed from Lavender would be sufficient to constitute an estoppel by one in privity with the defendant to disclaim that Lavender was owner at the time of that conveyance.

Byrne vs. Morehouse, 22 Ill., 602.
Pinckard vs. Milmine, 76 Ill., 453.
Orthwein vs. Thomas, 13 N. E. Rep., 564.
Heirs vs. McIntosh, 12 O. S., 231.

Whether the plaintiff is in a position to insist on an estoppel by reason of the recital in this deed may be questioned. If Courtnay was estopped by the acceptance of that deed to claim that he already had title to the land, then both his defenses must fall by the findings of the jury.

In any view of the case we do contend that it was an act inconsistent with title in defendant. Now Lavender had long prior thereto conveyed to Jason G. Miller the property

in controversy, and the title in fact was not in him, but was then in Miller, and therefore Lavender had no title to convey.

The judgment of the circuit court was erroneous and should be set aside.

Respectfully submitted.

WALTER J. LAMB,
A. C. RICKETTS,
HENRY H. WILSON,
Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
DEC 26 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1893.

No. 1250.

MARY P. MILLER, Devisee of JASON G. MILLER, Deceased, *Plaintiff in Error.* vs. DOMINIC G. COURTNAY, *Defendant in Error.*	Error to the Circuit Court of the United States for the District of Nebraska.

BRIEF OF DEFENDANT IN ERROR.

D. G. COURTNAY, *Pro se.*

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

No. 1250.

MARY P. MILLER, Devisee of JASON G. MILLER, Deceased, *Plaintiff in Error.* vs. DOMINIC G. COURTNAY, *Defendant in Error.*	Error to the Circuit Court of the United States for the District of Nebraska.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This case was tried at the January term of the United States Circuit Court at Lincoln, Nebraska, before a jury, who rendered a verdict, of special findings. The deeds and record referred to in the special findings are in the hands of the Clerk of the Circuit Court and attached to the original verdict.

The defendant moves for judgment on the findings of the jury.

I.

The defendant, Dominic G. Courtnay, claims title through two different sources, viz: By possession of his grantors of the property in question for more than ten years prior to the commencement of this action.

The jury find that the defendant and his grantors had actual possession, which possession was open, notorious, continuous and visible from April 1, 1876, to the time of the commencement of this action which was February, 1887.

There is no proof of plaintiff showing that Lavender made any pretense to take possession of the property in controversy. Lavender being the plaintiff's grantor. On the contrary, J. E. Philpot, Lavender's attorney, testified that Lavender abandoned the property in question to the possession of Atkins.

II.

The other source is a sheriffs deed from the sheriff of Lancaster county, Nebraska, to Martha I. Courtnay. From Martha I. Courtnay to this defendant.

In September, 1879, Henry Atkins deeded to Martha I. Courtnay all his interest in said property, that deed carried with it all the rights which Atkins had by reason of his possession.

Stelnische vs. Lamb, 18 Neb., 626.

Alexander vs. Pendelton, 8 Cranch (U. S.) 462.

Clark vs. Chase, 5 Sweed (Tenn.) 636.

Fanning vs. Wilcox, 3 Day (Conn.) 269.

III.

ADVERSE POSSESSION.

The question as to whether the possession is adverse, is a question of law, to be passed upon after the jury has made its findings of fact. What is it that constitutes adverse possession?

4 Neb., 47.

13 Neb., 153.

13 Neb., 417.

17 Neb., 79.

17 Neb., 240.

17 Neb., 83.

IV.

On March 22, 1879, Lavender was divested by sheriffs deed and sale to Martha I. Courtnay of the estate, both equitable and legal, that he had in said property November 4, 1873, the date of judgment.

500 Code of Civil Proceedure, p. 803.

Petit vs. Black, 13 Neb., 147.

Now what interest did Luke Lavender have in said

property on February 21, 1883, when he made two quit claim deeds to Miller. The sheriffs deed to Martha I. Courtnay was then in force and Lavender had been divested of his title both legal and equitable.

A quit claim deed conveys only a legal title of the grantor.

10 Neb., 584.
19 Neb., 657.

V.

The plaintiff in this case should not on the date of the filing of his petition maintain the action for the reason that he took no greater title than Lavender, his grantor, had at the date of his deed, viz: February 21, 1883, at which time the sheriffs deed to Martha I. Courtnay was still in force and before even Lavender could have maintained ejectment against this defendant he would have been compelled to go into a court of equity to set aside the sheriffs deed to Martha I. Courtnay.

The plaintiff in error must recover on the strength of his own title and not on the weakness of his adversaries. By a decree of the District Court of Lancaster county, Lavender got a right of the equity of redemption by paying a certain amount with interest. This was only an equitable right. Ejectment cannot be maintained on an equitable title. Miller by his quit claim deed took nothing but the naked legal title of

Lavender. Lavender never transfered his equitable title to Miller, nor did he have any equity in the property in controversy until ....., 1885, when he was given the right to redeem conditionally, which he refused to do. The plaintiff in this case must show legal title in order that he may recover.

2 Neb., 451.
5 Neb., 525.
2 Neb., 112.
626 Code of Civil Procedure, 822 (1887.)

VI.

The decree in the case in the District Court of Lancaster county, was a conditional decree and it was discretionary with Lavender whether he would comply with the terms thereof. He waived his equitable right to redeem the property in question. The judgment was duly rendered against him which judgment was afterwards affirmed in the Supreme court of this state. See 20, Nebraska.

So that Miller cannot claim legal title to the property in question through the said decree. Lavender's right to redeem did not exist in 1883, the time the quit claim deeds were made by him to Miller.

VII.

Courtnay and his grantors had paid the taxes on the property in question from and including 1876 down

to and including 1888, and this is admitted by the plaintiff. *This is a strong circumstance, showing who claimed the title to the property in controversy.*

VIII.

Sixty feet in width and forty rods in length of the property in controversy is dedicated to the city of Lincoln for the street and is now used as a street by said city. The plaintiff could maintain an action of ejectment for the 100 feet in width and forty (40) rods in length, as the deed expressly provides that said land is for the public to be used as a continuation of "M" street.

The sixty feet heretofore spoken of and used as a street, is also a continuation of "M" street so that only forty feet in width and forty rods in length of the land mentioned in that deed is in controversy. The jury find that the sixty feet is used as a street.

IX.

The sheriffs deed to Martha I. Courtnay is evidence that the judgment was a live and subsisting lien upon the property and that all the proceedings up to and including its execution were regular. There is no proof in this case to the contrary. The deed is sufficient evidence of the legality of such sale and proceedings therein until the contrary be proven.

500 Code of Civil Procedure, 803.

X.

The deed executed in 1885 from Lavender to D. G. Courtnay in no way interferes with the title or possession of Henry Atkins or of Martha I. Courtnay, as they were in possession at this time, and were not parties to that deed. Neither Atkins or Martha I. Courtnay could be bound by the contract of D. G. Courtnay.

XI.

There is no proof that this is the Henry Atkins that had the judgment against Luke Lavender on which the property was sold in 1879, nor is there any proof that this Henry Atkins in question owned a judgment against Lavender in 1879, at the time of the judicial sale. Judgments are assignable. Any execution which might be issued on the judgment after its assignment would be entitled to the same as in the former case and the assignee of the judgment would not be known in the transaction.

XII.

The quit claim deed conveys only the title which the grantor then had, and does not prevent him from cosubsequently acquiring and holding an outstanding title.

Henry vs. Bell, 5 Vt., 393.
Smith vs. Pollard, 19 Vt., 272.

Lavender did not convey to Miller any title or

equity to the premises in controversy, which he afterwards acquired by the decree.

XIII.

Ejectment does not lie on a mere equitable title.

Dewey vs. Long, 25 Vt. 564.
Cheney vs. Cheney, 26 Vt., 606.
Royalton Bank vs. Downer, 28 Vt., 635.

XIV.

A defendant in ejectment who did not derive his possession from the plaintiff and claims adversely, may at any time before trial purchase an outstanding title to protect his possession.

Tucker vs. Keller, 4 Vt., 16.

Some authorities hold that adverse possession is a question of law and others that it is a question of fact. But we contend that it is a mixed question of law and fact, that the facts being found in the case by the jury, it now is a question of law upon these facts as found, and when the law is applied to the facts as found by the jury, the adverse possession of the defendant is established and is complete, and the title of the defendant perfect. And we further maintain that the judgment of Atkins against Lavender dated November 4, 1873, became a lien upon the land in dispute, and the lien of that judgment having been kept alive, the sheriffs deed made on a sale under that judgment, dated

March 22. 1879, carried and conveyed all the title of Lavender in and to the premises which he had at the date of said judgment, and as the sheriffs deed recited, and it follows that Lavender by his quit claim to Miller conveyed nothing.

D. G. COURTNAY,.

Pro se.